Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts

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One of the visible concerns of the Supreme Court in recent years has been the delicate balancing of interests expressed by the concept of "our federalism."[1] The competing concerns of state judicial sovereignty and federal power that are embodied within this concept typically come into sharp conflict in federal court actions brought in response to alleged deprivations of constitutional rights by state courts. Such actions are generally brought under the authority of section 1983 of Title 42 of the United States Code,[2] which provides a right of action for persons deprived under color of state law "of any rights, privileges, or immunities secured by the [federal] Constitution and laws."[3] The role of the federal district courts has been central in this confrontation, for often these are the courts that intervene in state court proceedings.[4]

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Although I represent the State of Hawaii in three cases discussed herein, Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Hawaii 1978); Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977) (amicus curiae); and Zimring v. Hawaii, Civ. No. 79-0054 (D. Hawaii, filed June 25, 1979), the views expressed in this Article are strictly my own.

1. "This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This . . . is referred to by many as 'Our Federalism' . . . ." Younger v. Harris, 401 U.S. 37, 44 (1971).

2. 42 U.S.C. § 1983 (1976).

3. *Id.*

4. The Supreme Court has stated: "The very purpose of [42 U.S.C. § 1983 (1976)] was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state

The Supreme Court has also evinced a strong interest in balancing concerns of state sovereignty and federal power, as shown by *Younger v. Harris*[5] and its progeny.[6] In contrast to the Court's active review in the *Younger* area, however, the Supreme Court has cautiously avoided another prominent area of federal and state judicial conflict. In the last decade the lower federal courts have often faced the question of whether a federal action under section 1983, brought subsequent to a state court proceeding, is barred by res judicata.[7] In *Preiser v. Rodriguez*,[8] the Court suggested that the question had been resolved in favor of applying res judicata,[9] and in *Ellis v. Dyson*,[10] the Court declined to address the question altogether.[11] Considering the confusion among the circuit courts of appeal,[12] reluctance to confront this question[13] may

law, 'whether that action be executive, legislative or judicial.' " Mitchum v. Foster, 407 U.S. 225, 242 (1972) (quoting *Ex parte* Virginia, 100 U.S. 339, 346 (1879)). The *Younger* line of cases involving federal challenges to state court judgments, discussed herein, illustrates the many instances where federal courts have been called on to intervene in state court action.

5. 401 U.S. 37 (1971).

6. Trainor v. Hernandez, 431 U.S. 434 (1977); Wooley v. Maynard, 430 U.S. 705 (1977); Juidice v. Vail, 430 U.S. 327 (1977); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Kugler v. Helfant, 421 U.S. 117 (1975); Huffman v. Pursue, 420 U.S. 592 (1975); Steffel v. Thompson, 415 U.S. 452 (1974); Perez v. Ledesma, 401 U.S. 82 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Samuels v. Mackell, 401 U.S. 66 (1971), are representative of the major *Younger* developments of the 1970s.

7. *E.g.*, Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103 (1st Cir. 1978); Ellentuck v. Klein, 570 F.2d 414 (2d Cir. 1978); Red Fox v. Red Fox, 564 F.2d 361 (9th Cir. 1977); Grossgold v. Supreme Court of Ill., 557 F.2d 122 (7th Cir. 1977); Graves v. Olgiati, 550 F.2d 1327 (2d Cir. 1977); Cornwell v. Ferguson, 545 F.2d 1022 (5th Cir. 1977); Rios v. Cessna Fin. Corp., 488 F.2d 25 (10th Cir. 1973); Roy v. Jones, 484 F.2d 96 (3d Cir. 1973).

8. 411 U.S. 475 (1973).

9. "On the other hand, res judicata has been held to be fully applicable to a civil rights action brought under § 1983." *Id.* at 497 (citations omitted).

10. 421 U.S. 426 (1975).

11. *Id.* at 439-41 n.6 (Powell, J., dissenting). For a discussion of the Supreme Court's silence on this issue, see generally Torke, *Res Judicata in Federal Civil Rights Actions Following State Litigation*, 9 IND. L. REV. 543, 544-46 (1976) [hereinafter cited as Torke].

12. The confusion among courts was noted by the Sixth Circuit in Getty v. Reed, 547 F.2d 971, 975 (6th Cir. 1977): "If what we have said thus far suggests that the District Judge who held he had 'no jurisdiction' to try this case simply missed the signs on a well marked trail, we hasten to acknowledge that no such thing is true. One commentator, Theis, has noted that the Supreme Court has given no guidance as to claim preclusion by final state court decision in § 1983 cases and added that as a result 'the decisions of the lower courts teem with inconsistencies.' "

All circuit courts of appeal at one time or another have applied res judicata to bar a subsequent claim. *See, e.g.*, Davis v. Towe, 526 F.2d 588 (4th Cir. 1975); Blankner v. City of Chicago, 504 F.2d 1209 (6th Cir. 1974); Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); Thistlethwaite v. City of New York, 497 F.2d 339 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974); Roy v. Jones, 484 F.2d 96 (3d Cir. 1973); Francisco Ent., Inc. v. Kirby, 482 F.2d 481 (9th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974); Metros v.

appear more a matter of prudence than of hesitance.

Confusion about the propriety of a section 1983 action subsequent to a state court judgment has been compounded by uncertainty concerning the interplay of res judicata and the general jurisdictional principles expressed in *Rooker v. Fidelity Trust Co.*,[14] prohibiting lower federal courts from exercising appellate jurisdiction. Many courts have confused the *Rooker* doctrine with res judicata;[15] the doctrine also has been confused with the principles announced in *Younger* and its prog-

United States Dist. Court, 441 F.2d 313 (10th Cir. 1970); Coogan v. Cincinnati Bar Ass'n, 431 F.2d 1209 (6th Cir. 1970); Brown v. Chastain, 416 F.2d 1012 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970); Norwood v. Parenteau, 228 F.2d 148 (8th Cir. 1955). These cases are cited in Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 322 n.106 (1978) [hereinafter cited as Currie]. The Second, Fifth, Sixth, and Ninth Circuits on occasion have not applied res judicata fully. *See* Getty v. Reed, 547 F.2d 971 (6th Cir. 1977); Blunt v. Marion County Bd. of Educ., 515 F.2d 951 (5th Cir. 1975); Lombard v. Board of Educ., 502 F.2d 631 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975); Ney v. California, 439 F.2d 1285 (9th Cir. 1971).

There has also been confusion within the approaches taken by a single circuit. In New Jersey Educ. Ass'n v. Burke, 579 F.2d 764, 773 n.48 (3d Cir.), *cert. denied*, 439 U.S. 894 (1978), the Third Circuit pointed out the inconsistencies in the Fifth Circuit position: "The Fifth Circuit has taken a somewhat inconsistent position. Compare Blunt v. Marion County Bd. of Educ., 515 F.2d 951 (5th Cir. 1975) (plaintiff allowed to raise federal claims not pressed in state court litigation previously); Maher v. City of New Orleans, 516 F.2d 1051, 1055-58 (5th Cir. 1975) (plaintiff allowed to challenge zoning ordinance as unconstitutional, despite his prior attempt to overturn it on state grounds in state court), with Jennings v. Caddo Parish School Bd., 531 F.2d 1331 (5th Cir. 1976), *cert. denied*, 429 U.S. 897 . . . (dictum) (prior state court judgment conclusive as to issues which might have been litigated); Cornwell v. Ferguson, 545 F.2d 1022 (5th Cir. 1977) (same)." The Second Circuit also has arrived at inconsistent decisions. *Compare* Winters v. Lavine, 574 F.2d 46 (2d Cir. 1978) (res judicata bars issues which could have been raised) *and* Tang v. New York Supreme Court, 487 F.2d 138 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974) (res judicata bars claims implicitly decided), *with* Graves v. Olgiati, 550 F.2d 1327 (2d Cir. 1977) (issues not raised not barred by res judicata), Newman v. Board of Educ., 508 F.2d 277 (2d Cir.), *cert. denied*, 420 U.S. 1004 (1975) (same), *and* Lombard v. Board of Educ., 502 F.2d 631 (2d Cir. 1974), *cert. denied*, 410 U.S. 976 (1975) (same).

13. The Supreme Court has denied certiorari in cases presenting this issue on many occasions. *See, e.g.*, Turco v. Monroe County Bar Ass'n, 554 F.2d 515 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977); Scoggin v. Schrunk, 522 F.2d 436 (9th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976); Newman v. Board of Educ., 508 F.2d 177 (2d Cir.), *cert. denied*, 420 U.S. 1004 (1975).

14. 263 U.S. 413 (1923).

15. *See, e.g.*, Ellentuck v. Klein, 570 F.2d 414, 425 (2d Cir. 1978); Getty v. Reed, 547, F.2d 971 (6th Cir. 1977); Hutcherson v. Lahtin, 485 F.2d 567, 569 (9th Cir. 1973); Roy v. Jones, 484 F.2d 96, 99 n.11 (3d Cir. 1973); Hanley v. Four Corners Vacation Properties, Inc., 480 F.2d 536, 538 (10th Cir. 1973); Bricker v. Crane, 468 F.2d 1228, 1231 (1st Cir. 1972), *cert. denied*, 410 U.S. 930 (1973); Brown v. Chastain, 416 F.2d 1012, 1021 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970) (Rives, J., dissenting); Norwood v. Parenteau, 228 F.2d 148, 150 (8th Cir. 1955); Wilke & Holzheiser, Inc. v. Reimel, 266 F. Supp. 168, 170 (N.D. Cal. 1967).

eny.[16] Thus, the res judicata effect of state court decisions on subsequent section 1983 actions remains unclear.

With few exceptions,[17] commentators have been critical of cases applying res judicata to bar federal actions under section 1983 subsequent to a state court judgment and have argued for excepting these actions from the principles of merger and bar.[18] This Article suggests that there is a vehicle more appropriate than res judicata for resolving the question of whether unsuccessful state court litigants may attack state court judgments in subsequent federal actions. This vehicle is the *Rooker* doctrine. In addition, this Article presents an alternative to the interpretation of *Rooker* as an independent jurisdictional doctrine[19] by analyzing the principles of the *Rooker* doctrine as an aspect of res judicata. *Rooker* suggests the merger and bar[20] principles of res judicata are *jurisdictional* principles[21] and therefore cannot be waived,[22] a view

16. See text accompanying notes 209-42 *infra*. *See also* New Jersey Educ. Ass'n v. Burke, 579 F.2d 764 (3d Cir.), *cert. denied*, 439 U.S. 894 (1978); Piatt v. Louisville & Jefferson City Bd. of Educ., 556 F.2d 809 (6th Cir. 1977); Williams v. Washington, 554 F.2d 369, 371 (9th Cir. 1977); Duke v. Texas, 477 F.2d 244, 253 (5th Cir.), *cert. denied*, 415 U.S. 978 (1974); Kay v. Florida Bar, 323 F. Supp. 1149 (S.D. Fla. 1971).

17. *E.g.*, Currie, *supra* note 12, at 327-32 (arguing that § 1983 does not create an exception to res judicata).

18. Averitt, *Federal Section 1983 Actions After State Court Judgment*, 44 U. COLO. L. REV. 191, 195-96 (1972) [hereinafter cited as Averitt] (exception to res judicata where state remedies exhausted and federal claimant was an unwilling defendant in state proceedings); McCormack, *Federalism and Section 1983: Limits on Judicial Enforcement of Constitutional Claims*, 60 VA. L. REV. 250, 276-77 (1974) (pt. II) [hereinafter cited as McCormack] (res judicata should not bar subsequent § 1983 action (1) where litigation was between individual and state, (2) the state had an institutional interest in the litigation, and (3) there was a procedural due process defect); Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 NW. U.L. REV. 859, 882 (1976) [hereinafter cited as Theis] (res judicata should apply only where litigant has freely presented constitutional claims for resolution); Torke, *supra* note 11, at 574 (distinction between bar and merger principles and collateral estoppel); *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1351 (1977) [hereinafter cited as *Developments*] (collateral estoppel should not apply to subsequent § 1983 actions).

19. *Rooker* has been viewed by the courts as a jurisdictional bar to relitigation. Tang v. New York Supreme Court, 487 F.2d 138, 141 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974); Hanley v. Four Corners Vacation Properties, Inc., 480 F.2d 536, 538 (10th Cir. 1973); Community Action Group v. City of Columbus, 473 F.2d 966, 973 (5th Cir. 1973); Paul v. Dade County, 419 F.2d 10, 13 (5th Cir. 1969), *cert. denied*, 397 U.S. 1065 (1970); Brown v. Chastain, 416 F.2d 1012, 1014 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970); Maurice v. Board of Directors, 450 F. Supp. 755, 759 (E.D. Va. 1977).

20. "Bar" and "merger" are the claim preclusion aspects of res judicata. RESTATEMENT OF JUDGMENTS, Introductory Note at 158-59 (1942). Professor Vestal has used the term "claim preclusion" in place of bar and merger. Vestal, *Res Judicata/Preclusion: Expansion*, 47 S. CAL. L. REV. 357 (1974).

21. See text accompanying notes 107-24 *infra*. *See generally* Theis, *supra* note 18, at 880 (raising question of the relationship between *Rooker* and res judicata).

contrary to the traditional characterization of merger and bar as affirmative defenses.[23] Because any claim that the federal district courts would lack jurisdiction to hear under *Rooker* also would be barred by a previous judgment under principles of res judicata, the scope of claim preclusion is identical under the two doctrines. Accordingly, any action barred by res judicata also would be barred by *Rooker*. Thus, in determining the preclusive effect of a state court judgment, if the law of the state rendering the judgment would require the application of res judicata, the federal court must apply bar or merger and dismiss the action even if the issue was not raised by the parties.

As an obligatory,[24] statutorily-based[25] expression of federalism, *Rooker* is the appropriate basis for deciding the issue of a subsequent attack on a state court judgment by a federal action. *Rooker* also can apply to those cases now resolved only through a strained application of *Younger*.[26] Furthermore, this Article demonstrates that *Rooker* is consistent with the recent Supreme Court cases[27] attempting to preserve the authority and independence of state judicial systems. The result reached in *Rooker* has been termed "obvious,"[28] and "unimpeachable in context."[29] Perhaps so, but what has not been obvious are the sweeping ramifications of the doctrine that derive from the statute governing the jurisdiction of the federal courts. *Rooker*, although long ignored in favor of other doctrines, is an embodiment of fundamental principles of federalism[30] and no longer should be overlooked.

22. See text accompanying notes 107-18 *infra*. *See* Maurice v. Board of Directors, 450 F. Supp. 755, 759 (E.D. Va. 1977) (difference between *Rooker* and res judicata).

23. FED. R. CIV. P. 8(c) (res judicata an affirmative defense). *See also* Huffman v. Pursue, Ltd., 420 U.S. 592, 607 n.19 (1975).

24. Since *Rooker* is jurisdictional, a court must dismiss a case on its own motion if the case violates *Rooker* principles. *See* Paul v. Dade County, 419 F.2d 10 (5th Cir. 1969), *cert. denied*, 397 U.S. 1065 (1970); Mansfield, Coldwater & Lake Michigan R.R. v. Swan, 111 U.S. 379, 384 (1884). See text accompanying notes 39-42 *infra*.

25. See text accompanying notes 73-80 *infra*.

26. See text accompanying notes 206-41 *infra*.

27. *See* Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977). In addition to *Younger* and its progeny, the Burger Court has been active in resolving federalism questions in other areas as well. Some of the more salient instances are Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977) (federal securities regulation not to displace state corporation law); Stone v. Powell, 428 U.S. 465 (1976) (habeas corpus); National League of Cities v. Usery, 426 U.S. 833 (1976) (tenth amendment applied to congressional action concerning essential state functions).

28. Theis, *supra* note 18, at 879.

29. Brief for Appellee McBryde Sugar Co. at 51, Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977).

30. *See* Konigsberg v. State Bar, 353 U.S. 252, 274 (1957) (Frankfurter, J., dissenting).

The Rooker Doctrine

In *Rooker v. Fidelity Trust Co.*[31] the losing party to a state court action sought a bill in equity in federal court to declare null and void an Indiana state court judgment.[32] Except for the addition of two defendants, all of the parties in the federal action were the same as those in the state action.[33] The plaintiffs asserted that the state court judgment upholding an Indiana state statute violated the contracts clause and the due process and equal protection provisions of the fourteenth amendment.[34] After deciding that the state court acted within its jurisdictional power,[35] the Supreme Court explicitly held that the federal district court had no jurisdiction to review the state court judgment.[36] The Supreme Court emphasized the statutory limitations on federal district court jurisdiction: "Under the legislation of Congress, no court of the United States could entertain a proceeding to reverse or modify the judgment for errors of [law] . . . . To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original."[37] Hence, the *Rooker* doctrine bars federal district courts from acting as appellate courts determining previously litigated claims. In essence, this prevents the lower federal courts from taking jurisdiction in a case where res judicata would bar the same action in state court.[38]

The principle that the power of the federal district courts does not include any acts of appellate jurisdiction, judicially expressed in *Rooker*, can also be deduced from a purely statutory analysis. Sections 1331[39] and 1343[40] of Title 28, which set forth the actions in which the

31. 263 U.S. 413 (1923).
32. *Id.* at 414.
33. *Id.*
34. *Id.* at 414-15.
35. *Id.* at 415.
36. *Id.* at 416.
37. *Id.* (citations omitted).
38. See text accompanying notes 81-124 *infra*.
39. 28 U.S.C. § 1331 (1976) states:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

"(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any set off or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."

district courts have original jurisdiction, and section 1257,[41] which defines the appellate jurisdiction of the Supreme Court, together mandate that the federal district courts may not exercise "appellate jurisdiction"[42] over state court judgments. This statutory basis of the *Rooker* doctrine, however, has gone unrecognized by both courts[43] and com-

40. 28 U.S.C. § 1343 (1976) provides: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

"(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

41. 28 U.S.C. § 1257 (1976) provides: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States."

42. See text accompanying notes 81-124 *infra*.

43. Many courts view *Rooker* as an alternative to res judicata rather than as a statutory, jurisdictional bar. *See, e.g.*, Ellentuck v. Klein, 570 F.2d 414, 425 (2d Cir. 1978); Hutcherson v. Lahtin, 485 F.2d 567, 569 (9th Cir. 1973); Roy v. Jones, 484 F.2d 96, 99 n.11 (3d Cir. 1973); Francisco Ent., Inc. v. Kirby, 482 F.2d 481, 484-85 (9th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974); Hanley v. Four Corners Vacation Properties, Inc., 480 F.2d 536, 538 (10th Cir. 1973); Bricker v. Crane, 468 F.2d 1228, 1231-32 (1st Cir. 1972), *cert. denied*, 410 U.S. 930 (1973); E.B. Elliot Adv. Co. v. Dade County, 425 F.2d 1141, 1148 (5th Cir. 1970); Davis v. Adams, 315 F. Supp. 1293, 1294 (N.D. Fla. 1970); Hilliard v. Pennsylvania, 308 F. Supp. 756, 760 (W.D. Pa. 1970).

Those courts properly noting the jurisdictional basis of *Rooker* are Brown v. Chastain, 416 F.2d 1012, 1013 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970); Sitton v. United States, 413 F.2d 1386, 1389 (5th Cir. 1969); Dade County Classroom Teachers' Ass'n v. Nathan, 413 F.2d 1005, 1006 (5th Cir. 1969); Pilkinton v. Pilkinton, 389 F.2d 32, 33 (8th Cir. 1968); Ash v. Northern Ill. Gas Co., 362 F.2d 148, 151 (7th Cir. 1966); Hanna v. Home Ins. Co., 281 F.2d 298, 303 (5th Cir. 1960) (citing Williams v. Tooke, 108 F.2d 758 (5th Cir.), *cert. denied*, 311 U.S. 655 (1940)); Maurice v. Board of Directors, 450 F. Supp. 755, 758 (E.D. Va. 1977); Smiley v. South Dakota, 415 F. Supp. 870, 874 (D.S.D. 1976), *aff'd*, 551 F.2d 774 (8th Cir.

mentators.[44] Instead, *Rooker* has been viewed as a judicially created doctrine limited to its facts[45] or to be narrowly construed in light of other cases.[46] These views ignore both the statutory bases of *Rooker*[47] and the exclusive jurisdiction of the Supreme Court to review state court judgments.[48] These interpretations confuse *Rooker* with res judicata and imply that fundamental jurisdictional defects can be remedied by exalting form over substance. A careful analysis of *Rooker*, however, reveals that its jurisdictional derivation clearly distinguishes it from the non-jurisdictional concept of res judicata.[49] Indeed, mere manipulation of parties and pleadings cannot grant jurisdiction where *Rooker* compels dismissal.[50]

1977); Malinou v. Cairns, 293 F. Supp. 1007, 1009 (D.R.I. 1968); Manufacturers Record Pub. Co. v. Lauer, 169 F. Supp. 234, 237 (E.D. La.), *aff'd*, 268 F.2d 187 (5th Cir. 1959).

44. See note 46 & accompanying text *infra*.

45. *See, e.g.*, Getty v. Reed, 547 F.2d 971, 976 (6th Cir. 1977) ("[*Rooker*] was not a case like our instant case attacking a state statute as violative of the Federal Constitution under § 1983 and seeking declaratory and injunctive relief").

46. For example, various commentators characterize *Rooker* as identical to res judicata and thus repudiated by the "frivolous federal claim" doctrine of Bell v. Hood, 327 U.S. 678 (1946). The "frivolous claim" doctrine provides that a federal court will not dismiss a claim based on the Constitution or federal statutes unless the claim is "[w]holly insubstantial and frivolous." *Id.* at 682-83. *See, e.g.*, Averitt, *supra* note 18: "Many of those courts denying jurisdiction have done so in reliance on the elderly Supreme Court case of *Rooker v. Fidelity Trust* . . . . This language is, however, probably only a figurative designation for res judicata; and if not it appears to have been repudiated in *Bell v. Hood*." *Id.* at 198-99. *See also* Brown v. Chastain, 416 F.2d 1012, 1018 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970) (Rives, J., dissenting) (*Bell* limits *Rooker*). Others follow this view and argue that *Rooker* is an "anachronism." *See, e.g.*, Torke, *supra* note 11, at 546-47.

One commentator dismisses *Rooker* as an obvious result in light of the trivial nature of the plaintiff's suit: "Since it appeared that Rooker's attack on the state judicial processes was wholly frivolous, the Court probably reached a correct result." McCormack, *supra* note 18, at 278. Professor McCormack argues that *Rooker* precludes a subsequent federal action only if the federal claimant has a choice of forums and there are no procedural due process claims involved, thus disagreeing with the basic jurisdictional premise of *Rooker*. "The crucial point to be made at this state is that principles of federalism do not divest the federal courts, in any constitutional or jurisdictional sense, of the power to relitigate issues that were or could have been decided in prior state proceedings." *Id.* at 277. In accordance with this view, it has been argued that *Rooker* jurisdictional defects can be remedied easily by amending the complaint. *Developments*, *supra* note 18, at 1133. Under this interpretation, dismissal should occur only if it appears "on the face of the complaint that the plaintiff was seeking appellate review of the state court judgment." *Id.* at 1334 n.14.

47. *See* 263 U.S. at 416 ("[u]nder the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character").

48. See note 54 *infra*.

49. See text accompanying notes 107-24 *infra*.

50. Disguised appeals as well as attempts at direct review are prohibited under *Rooker*. *See* Ash v. Northern Ill. Gas Co., 362 F.2d 148, 151 (7th Cir. 1966) (attempt at direct federal

Statutory and System-Consistent Bases of Rooker

The Supreme Court's Exclusive Jurisdiction to Review State Court Judgments

The first principle on which the *Rooker* doctrine is founded is that the Supreme Court is the only federal court that may review the judgments of state courts.[51] This principle is fundamental to our tradition of federalism but nevertheless is often overlooked. Today, when refiling a claim in federal court may be almost an automatic response to an unsatisfactory state court result, it is easy to forget how reluctantly the states acquiesced to any federal review of state court judgments.[52] The power of the Supreme Court to review state court decisions, first challenged in *Martin v. Hunter's Lessee*,[53] has been attacked repeatedly.[54] In light of this history, *sua sponte* expansion of the jurisdictional power of the lower federal courts is rendered patently unexplainable.[55]

Consistency within the federal judicial system requires that the Supreme Court have exclusive jurisdiction to review state court judgments. Otherwise, the principles that currently restrict the Supreme Court's powers of review over state court judgments: the highest state court requirement,[56] the time limitation on review,[57] and the limitation

appeal); Zimring v. County of Hawaii, Civ. No. 79-0054 (D. Hawaii, filed June 25, 1979) (disguised appeal).

51. *See* 263 U.S. at 416. *See* 28 U.S.C. § 1257 (1976); Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970).

52. See note 54 *infra*.

53. 14 U.S. (1 Wheat.) 304 (1816). *See generally* Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need For Additional Appellate Capacity*, 64 CALIF. L. REV. 943, 946-48 (1976).

54. *See* Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964). "[T]he spirit of the Virginia and Kentucky Resolutions will not down [sic]. In crisis after crisis, from *McCulloch v. Maryland* to *Baker v. Carr*, every important decision invalidating a state law has brought forth a rash of irresponsible proposals to limit the Court's jurisdiction, to alter its procedures or composition, or to subject its decisions to review by an unwieldy tribunal composed of judges from the courts of each of the fifty states. South Carolina once prescribed criminal penalties for appealing state court decisions to the Supreme Court. Others sought to deprive the Court of its jurisdiction over state judgments, to require the concurrence of five of the then seven Justices to hold a state law invalid, or to give appellate jurisdiction to the Senate whenever the validity of a state law was questioned." *Id.* at 5 & n.27.

55. Except for one unsuccessful attempt, see note 74 *infra*, Congress has never granted the lower federal courts appellate review over state court judgments. See authorities cited note 51 *supra*. Furthermore, the lower federal courts cannot unilaterally expand their own jurisdiction. *See* Zimring v. County of Hawaii, Civ. No. 79-0054 (D. Hawaii, filed June 25, 1979). The jurisdiction of the federal courts thus is limited to that granted by Congress.

56. 28 U.S.C. § 1257 (1976). *See* Currie, *supra* note 12, at 323: "I suspect that the Supreme Court was chosen to review state court judgments because only it had sufficient dignity to make federal review of state courts reasonably palatable; that the highest state-court requirement was designed to preclude federal interference unless and until state courts

of review to the state court record,[58] would be totally undermined. Thus, in terms of federalism-consistency,[59] the Supreme Court must have the sole power to review state court judgments.[60]

The Original Jurisdiction of the District Courts

The second principle upon which *Rooker* is based is the natural corollary of exclusive review by the Supreme Court: the federal district courts may exercise only "original" jurisdiction.[61] As used in the statutes, the term "original" jurisdiction is employed in direct contrast to "appellate" jurisdiction. Furthermore, basic concepts of our judicial process compel the result in *Rooker*. Even in the absence of the explicit language of sections 1331 and 1343 of Title 28, all trial courts are inherently limited to "original" jurisdiction over "original" acts. Without this limitation, the decisionmaking function of the judicial system would break down under the chaos of trial courts attacking each other's judgments. To be "system-consistent,"[62] courts of original jurisdiction adjudicate only "original," and not "appellate," acts. As a matter of "system-consistent" logic, federal district courts therefore cannot exercise appellate jurisdiction over the trial courts of the states.

The term "original acts" means acts, such as automobile accidents, breaches of contract, employment termination, and the like, that give rise to legal claims. In contrast, appellate acts are events that occur within the legal system: the decision of any court, even one of first resort, is thus an "appellate act." Within the concept of appellate acts

had had a full opportunity to avoid that clash; and that the time limits on Supreme Court review were meant to protect parties prevailing in state courts from stale challenges to their judgments. If any of these surmises is accurate, *Rooker* is right."

57. If a litigant could "appeal" to a federal district court, the lack of a limitation on appeals would subject the state decision to the perpetual possibility of reversal. *See also* Rooker v. Fidelity Trust Co., 263 U.S. at 416.

58. "Appeals" to the federal court allow a second record to be created while § 1257 limits review to the state court record. Currie, *supra* note 12, at 324 (citing Foster v. Illinois, 332 U.S. 134, 135-36, 138 (1947)). For the problems created by such double records, see generally Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Hawaii 1978); Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977).

59. Federalism-consistency is to be distinguished from system-consistency. See text accompanying note 62 *infra*. "System-consistency" refers to the requirements imposed on decisionmaking systems as a whole. "Federalism-consistency" refers to requirements that must exist to make effective a dual system of federal and state courts.

60. *See* Currie, *supra* note 12, at 323-24.

61. *See, e.g.*, 28 U.S.C. §§ 1331, 1343 (1976). *See also* Hanna v. Home Ins. Co., 281 F.2d 298, 303 (5th Cir. 1960); Malinou v. Cairns, 293 F. Supp. 1007, 1009 (D.R.I. 1968).

62. The term "system-consistent" refers to corollaries that follow from the requirements of a decisionmaking system. Thus, the requirement of finality dictates that the right to appeal must be terminated at some point.

there exists a distinction between declaration acts (acts of declaring law) and process acts (the procedural manner in which the system treats a litigant). Since the procedural manner in which the system treats a litigant could constitute a separate claim; claims based on procedural abuses should not be dismissed under *Rooker*.[63] Federal court challenges to the substantive determinations of state court decisions (declaration acts), however, are impermissible under *Rooker*.[64] In such a situation the federal claimant is seeking to appeal the state court judgment to federal district court and permanently void the judgment as to rulings on substantive issues. While persons may sue perpetrators of "original acts" and "process acts," no one may sue a court on the basis of an act of declaring law. Consequently, appellate acts declaring substantive law may be corrected only by a higher court. Thus, in *Rooker*, as in some recent cases,[65] the losing party's claim that the state court's declaration of law[66] was a deprivation of constitutional rights vested on the premise that "declaration acts" can create a cause of action. The chaotic result of this faulty premise is easily demonstrated.

Assuming that appellate acts are equivalent to original acts and that a trial court may be sued because of its decision, there would be two methods available for challenging every decision: (1) the normal

63. Only factual or legal issues may be barred by res judicata if they are actually litigated in the prior action. Thus, Brown v. Chastain, 416 F.2d 1012 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970), was incorrectly decided and should *not* have been dismissed on *Rooker* grounds. In *Brown*, the federal claimant was not seeking to permanently annul the judgment. She was seeking to vindicate her rights to procedural due process.

64. For cases where the federal claimant has been successful in voiding the state court's declaration of substantive law, see Sotomura v. County of Hawaii, 463 F. Supp. 473 (D. Hawaii 1978) (state supreme court's determination of property rights held to be a denial of substantive and procedural due process); Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977) (state supreme court's declaration of property law voided). Attacks to annul the results of a valid and final state court judgment are clearly impermissible "appeals" under *Rooker*. For a proper resolution of these types of cases, see Smiley v. South Dakota, 551 F.2d 774, 775 (8th Cir. 1977) (citing *Rooker* for principle that federal district courts have no jurisdiction to entertain attacks on a state court declaration of riparian rights); Ash v. Northern Gas Co., 362 F.2d 148, 151 (7th Cir. 1966) (federal review of state eminent domain proceedings dismissed); Maurice v. Board of Directors, 450 F. Supp. 755, 758 (E.D. Va. 1977) (attempt to set aside state court judgment on retirement benefits disallowed on *Rooker* grounds); Zimring v. County of Hawaii, Civ. No. 79-0054 (D. Hawaii, filed June 25, 1979) (disguised appeal).

65. *See generally* Smiley v. South Dakota, 551 F.2d 774 (8th Cir. 1977); Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Hawaii 1978); Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977); Zimring v. County of Hawaii, Civ. No. 79-0054 (D. Hawaii, filed June 25, 1979).

66. *See* Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977) (the state court's declaration of law allegedly constituted a "taking" of property).

channel of appeal to the next highest court of the jurisdiction; and (2) collateral attack by filing suit in another trial court against the previous judge or other officials responsible for enforcement of the decision.[67] The theory of the second suit might be, for example, that the prior decision was an unconstitutional deprivation of property without due process of law.[68] Unorthodox as it may seem, this theory has been successful in recent cases,[69] implying that trial court decisions can be attacked in a second trial court under a claim of denial of due process. Furthermore, the second court's decision logically could be attacked in a third trial court, and so on.[70]

Accordingly, it is system-*in*consistent to argue that appellate acts be considered the equivalent of "original" acts. As a decisionmaking process, the judicial system must require finality at some point in time.[71] Appeals, of course, do not upset the requirement of finality.

67. Gipson v. New Jersey Supreme Court, 558 F.2d 701 (3d Cir. 1977) (attorney discipline case); Turco v. Monroe County Bar Ass'n, 554 F.2d 515 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977) (attorney discipline case); Adkins v. Underwood, 520 F.2d 890 (7th Cir.), *cert. denied*, 423 U.S. 1017 (1975) (justices sued for error in judgment); Tang v. New York Supreme Court, 487 F.2d 138 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974); Roy v. Jones, 484 F.2d 96 (3d Cir. 1973) (suit against state supreme court); Coogan v. Cincinnati Bar Ass'n, 431 F.2d 1209 (6th Cir. 1970) (attorney discipline case); Brown v. Chastain, 416 F.2d 1012 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970) (procedural due process claim against judges of juvenile court); Norwood v. Parenteau, 228 F.2d 148 (8th Cir. 1955) (state supreme court sued for "derelictive" jurisprudence); Olitt v. Murphy, 453 F. Supp. 354, (S.D.N.Y. 1978) (suspension proceeding). *But see* Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977), where the state supreme court was not named as a defendant, but the court's decision was the basis for the constitutional claim.

68. *See generally* Smiley v. South Dakota, 551 F.2d 774 (8th Cir. 1977) (state court decision on riparian rights an alleged denial of due process); Adkins v. Underwood, 520 F.2d 890 (7th Cir.), *cert. denied*, 423 U.S. 1017 (1975) (state supreme court's decision on joinder of parties alleged to violate due process clause of fourteenth amendment); Ash v. Northern Ill. Gas Co., 362 F.2d 148 (7th Cir. 1966) (state court exclusion of evidence alleged to lead to procedural due process violation); Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Hawaii 1978) (Hawaii Supreme Court alleged to be wrong on shoreline boundary issue; "taking" alleged); Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977) (Hawaii Supreme Court alleged to be wrong on water rights; "taking" asserted); Zimring v. County of Hawaii, Civ. No. 79-0054 (D. Hawaii, filed June 25, 1979) (Hawaii Supreme Court alleged to be wrong on case of first impression).

69. *See, e.g.*, Sotomura v. County of Hawaii, 460 F. Supp. (D. Hawaii 1978); Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977).

70. Not only could state trial and appellate decisions be attacked as unconstitutional in federal court, there is also some authority that allegedly unconstitutional federal district court decisions could be attacked in state trial courts. Since state courts have jurisdiction over civil rights claims, they conceivably could enjoin federal officials to protect and effectuate their judgments. *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 427-31 (2d ed. 1973).

71. *See* Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525 (1931); RE-

Equating original acts with appellate acts, however, would destroy the principle of finality. Moreover, because state courts have jurisdiction under section 1983, there is no compelling reason to assume that state trial courts could not review federal judgments as well as having federal review of state court judgments.[72] Thus, decisions by a federal court could be subject to the same lack of finality as those arising from state judgments.

Statutory Limitations on the District Courts

The *statutory* limitation of "original" jurisdiction is the third basis for the *Rooker* doctrine. The federal district courts, as courts of limited jurisdiction,[73] have only that jurisdiction which Congress determines is appropriate. Congress has yet to give the lower federal courts jurisdiction to review state court judgments.[74] This limitation is an obvious statutory corollary of the statutory grant to the Supreme Court of exclusive power to review state court judgments. The term "original" as used in the statutes clearly negates, as a matter of statutory construction, any implied "appellate" jurisdiction.

There are thus three rationales supporting the *Rooker* doctrine. Two are statutory: the *exclusive* jurisdiction of the Supreme Court to review state court judgments under section 1257 of Title 28,[75] and the

STATEMENT (SECOND) OF JUDGMENTS § 15, Comments a, b & c, at 122-27 (Tent. Draft No. 5, 1978); Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments*, 87 YALE L. J. 164, 192-95 (1977). *See generally* Bator, *Finality in Criminal Law and Federal Habeas Corpus For State Prisoners*, 76 HARV. L. REV. 441 (1963).

72. See note 70 *supra*.

73. *See, e.g.*, Malinou v. Cairns, 293 F. Supp. 1007, 1009 (D.R.I. 1968).

74. One situation where Congress did attempt to grant review of state court judgments to federal district courts is explained in Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need For Additional Appellate Capacity*, 64 CALIF. L. REV. 943 (1976). "In 1863 Congress provided for removal of certain cases to a circuit court before or *after* judgment in a state court with explicit provision for retrial of the facts and law in the circuit court . . . . That was properly held unconstitutional as violating the seventh amendment with respect to facts tried before a state court jury. . . . Although the statute was also applicable in non-jury cases, the Supreme Court declared it 'void' and it apparently was not utilized thereafter." *Id.* at 947-48 n.22.

One authority has asserted that the power of Congress to vest the lower federal courts with appellate jurisdiction over state courts has "never been doubted." H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 49 (1973). After National League of Cities v. Usery, 426 U.S. 833 (1976), however, some doubt surely must exist. In that case, the Supreme Court indicated that Congress is not free to interfere with the states' integral governmental functions. *Id.* at 855. It is difficult to conceive of a state function more integral than dispute resolution through a court system. Moreover, the tenth amendment would appear to constitute a substantial obstacle to any federal attempt to review questions of state law.

75. 28 U.S.C. § 1257 (1976).

grant of original jurisdiction to the federal district courts in sections 1331[76] and 1343.[77] The third rationale is non-statutory: if trial courts could readily annul the judgments of each other on the merits, the prerequisite of finality in the judicial system would be destroyed. This is the system-consistency basis of *Rooker*. Because Congress has been explicit when it has chosen to vest the power of review,[78] the lower federal courts cannot, in the absence of congressional action, enlarge their jurisdiction. Moreover, it is equally true that the Supreme Court cannot, explicitly or implicitly, grant to the lower federal courts its exclusive jurisdiction to review state court judgments.[79]

These principles of original federal district court jurisdiction and exclusive Supreme Court review are, like *Rooker*, somewhat self-evident. The difficult question, however, is ascertaining the scope of *Rooker* by identifying the instances in which a federal court impermissibly is acting "directly . . . or indirectly"[80] as an appellate court of a state.

The Scope of *Rooker* Preclusion: Res Judicata Congruity

In the last decade, the federal courts frequently have cited *Rooker*;[81] however, the scope of the *Rooker* preclusion of claims and issues has been often misunderstood.[82] On many occasions the applica-

76. *Id.* § 1331 (1976).

77. *Id.* § 1343. *See* Sitton v. United States, 413 F.2d 1386, 1389 (5th Cir. 1969); Ash v. Northern Ill. Gas Co., 362 F.2d 148, 151 (7th Cir. 1966).

78. *See* Currie, *supra* note 12, at 322 (citing statutes granting the courts of appeal jurisdiction to review final orders of administrative agencies). *See also* UMC Indus. Inc. v. Seaborg, 439 F.2d 953 (9th Cir. 1971). "It is well settled that if Congress, as here, specifically designates a forum for judicial review of administrative action, that forum is exclusive, and this result does not depend upon the use of the word 'exclusive' in the statute." *Id.* at 955.

79. *See* Konigsberg v. State Bar, 353 U.S. 252, 274 (1957). *See also* Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923) ("Under the legislation of Congress" only the Supreme Court can review state decisions). *See generally* Choper, *The Scope of National Power vis-a-vis the States: The Dispensability of Judicial Review*, 86 YALE L. J. 1552 (1977) (Congress is a better forum for resolving fundamental federalism questions).

The federal habeas corpus statute, 28 U.S.C. § 2241 (1976), is considered as an exception to § 1257. *See generally* Brown v. Allen, 344 U.S. 443 (1953). *See* Currie, *supra* note 13, at 323-24 n.50. However, this does not imply that §§ 1331 and 1343 are also exceptions to the exclusive jurisdiction to review state court judgments. If they did indeed constitute exceptions to § 1257, Supreme Court review under § 1257 would be destroyed altogether. Currie, *supra* note 13, at 322-23.

80. Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923).

81. *See, e.g.*, Smiley v. South Dakota, 551 F.2d 774 (8th Cir. 1977); Getty v. Reed, 547 F.2d 971 (6th Cir. 1977); Adkins v. Underwood, 520 F.2d 890 (7th Cir.), *cert. denied*, 423 U.S. 1017 (1975); Tang v. New York Supreme Court, 487 F.2d 138 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974).

82. Some courts have argued that *Rooker* applies only to claims actually raised and

tion of *Rooker* has been confused with the doctrine of res judicata.[83] In the following three cases the federal courts were asked to review a prior state court judgment and should have dismissed for lack of jurisdiction under the *Rooker* doctrine.

In *Getty v. Reed*,[84] Getty, an attorney, was disbarred on the grounds that he had used abusive conduct and speech in several state court trials. After hearing argument and considering a record compiled by a trial panel, the Kentucky Supreme Court affirmed a recommendation to disbar Getty. Getty thereafter turned to federal district court seeking injunctive relief under section 1983. The federal court applied the *Rooker* doctrine and dismissed for lack of jurisdiction.[85] The Sixth Circuit Court of Appeals reversed, however, emphasizing that Getty was attacking the constitutionality of a state statute and was raising substantial first amendment claims. The court distinguished *Rooker* as applying only where the federal district court obviously did not have jurisdiction.[86]

Sylvander v. New England Home for Little Wanderers[87] involved a Massachusetts law authorizing the probate court in certain instances to compel separation of a child from its mother without the mother's consent. Sylvander refused to consent to give up her child and the Home successfully petitioned a state probate judge for an order of separation. On appeal, the Supreme Judicial Court of Massachusetts upheld the probate judge's decision and found the state statute constitutional. Sylvander did not seek review in the United States Supreme Court but instead filed an action in federal district court alleging a claim under section 1983. The First Circuit Court of Appeals affirmed the lower court's dismissal; however, res judicata,[88] not *Rooker*, was the basis for the court's decision.

voluntarily litigated. *See* Getty v. Reed, 547 F.2d 971, 976 (6th Cir. 1977); Jack's Fruit Co. v. Growers Mktg. Serv., 488 F.2d 493, 494 (5th Cir. 1973); Tang v. New York Supreme Court, 487 F.2d 138, 145 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974); Hanley v. Four Corners Vacation Properties, Inc., 480 F.2d 536, 538 (10th Cir. 1973). These views are incorrect. *Rooker* would bar all claims that would be precluded under the res judicata law of the state. *See* text accompanying note 108 *infra*. Thus, even the Court's language in *Rooker*, which indicates the action is barred only "[i]f the constitutional questions stated in the bill *actually* arose in the cause," is not accurate. 263 U.S. at 415 (emphasis added).

83. See cases cited note 43 *supra*.
84. 547 F.2d 971 (6th Cir. 1977).
85. Getty v. Reed, 413 F. Supp. 511, 514 (E.D. Ky. 1976).
86. 547 F.2d at 976.
87. 584 F.2d 1103 (1st Cir. 1978).
88. *Id.* at 1107.

Similarly, in *Cornwell v. Ferguson*,[89] a teacher argued unsuccessfully before a university personnel committee that denial of his tenure violated his first amendment rights. He then petitioned a state appellate court to review the action and simultaneously filed suit in federal court. The federal court stayed further action pending the outcome of the state court proceedings. After reviewing the record, the state court denied certiorari to the administrative action, and no further state appeals were taken from this adverse determination. When Cornwell returned to federal court, his action was held to be barred by res judicata. The Fifth Circuit Court of Appeals affirmed.[90]

These three typical cases illustrate that the same questions that arise in the application of res judicata[91] arise as well under *Rooker*: Does the *Rooker* doctrine bar claims that could have been, but were not raised in state court?[92] Does it bar claims, such as in *Cornwell*, where the state court has not expressed an opinion on the constitutional claim?[93] Does it bar claims involving different defendants or different plaintiffs?[94] Is a civil rights action under section 1983, as were all three cases discussed above, an exception to *Rooker* preclusion?[95] As in

89. 545 F.2d 1022 (5th Cir. 1977).

90. *Id.* at 1026.

91. *See* Currie, *supra* note 12.

92. See cases cited note 82 *supra*.

93. The *Rooker* question of whether claims not *explicitly* decided in the state court action are barred in a subsequent action is analogous to the debate concerning the scope of res judicata. The courts have not uniformly decided the question of whether constitutional claims implicitly determined by a state judgment are forever barred by res judicata. For cases holding that implicit determinations are a bar, see Grubb v. Public Util. Comm'n, 281 U.S. 470, 477-78 (1930); Winters v. Lavine, 574 F.2d 46, 61 (2d Cir. 1978); Red Fox v. Red Fox, 564 F.2d 361, 364 (9th Cir. 1977); Grossgold v. Supreme Court of Ill., 557 F.2d 122, 124-25 (7th Cir. 1977). But see the following cases stating that unraised claims, not explicitly decided, are not barred: Graves v. Olgiati, 550 F.2d 1327, 1329 (2d Cir. 1977); Newman v. Board of Educ., 508 F.2d 277, 278 (2d Cir.), *cert. denied*, 420 U.S. 1004 (1975); Lombard v. Board of Educ., 502 F.2d 631, 636-37 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975).

94. Almost all litigants who seek an appeal of their adverse state court judgment add new defendants in the federal action. Rooker v. Fidelity Trust Co., 263 U.S. 413, 414 (1923) (addition of two defendants not significant). State officials responsible for enforcing the decision usually are added as federal defendants, a typical case being Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977), where the governor and land commission members were added. Cases discussing the lack of significance of new defendants in the res judicata context include Ellentuck v. Klein, 570 F.2d 414, 426 (2d Cir. 1978); Duncan v. Town of Blacksburg, 364 F. Supp. 643, 645 (W.D. Va. 1973).

The addition of new defendants has never been significant in cases decided under *Rooker*. *See* Rooker v. Fidelity Trust Co., 203 U.S. 413, 414 (1923); Smiley v. South Dakota, 551 F.2d 774 (8th Cir. 1977); Adkins v. Underwood, 520 F.2d 890 (7th Cir.), *cert. denied*, 423 U.S. 1017 (1975).

95. *See generally* Williams v. Washington, 554 F.2d 369 (9th Cir. 1977) (§ 1983 claim barred by *Younger*; *Rooker* mentioned); Smiley v. South Dakota, 551 F.2d 774, 776 (8th Cir.

Getty, does *Rooker* bar a federal claimant who was an involuntary defendant in a state court proceeding?[96] Finally, as in *Cornwell*, what of the federal plaintiff who is sent to state court under the doctrine of abstention?[97]

In answering these questions, the meaning of the *Rooker* doctrine must be emphasized: federal courts are prohibited from acting "directly . . . or indirectly" as appellate courts of the states.[98] Accordingly, neither the form nor language of the complaint,[99] nor the alignment of the parties[100] should prevail over the substance of the claim in analyzing whether an action is an appeal or an original claim.[101] Thus, "disguised" appeals[102] and facially obvious requests for review should be prohibited. The vast majority of federal actions to annul state court judgments, however, incorporate legal theories,[103] causes of action,[104] and parties different from the state court suit,[105]

1977) (*Rooker* grounds; § 1983 claim noted); Adkins v. Underwood, 520 F.2d 890 (7th Cir.), *cert. denied*, 423 U.S. 1017 (1975) (§ 1983 claim barred; *Rooker* noted); Tang v. New York Supreme Court, 487 F.2d 138, 141 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974) (§ 1983 claim barred by *Rooker*). *Rooker* properly bars a § 1983 claim which was raised or could have been raised in the state proceedings. See text accompanying notes 36-39 *supra*. For expressions to the contrary, see New Jersey Educ. Ass'n v. Burke, 579 F.2d 764, 772, 773-74 nn.50-52 (3d Cir.), *cert. denied*, 439 U.S. 894 (1978); Lombard v. Board of Educ., 502 F.2d 631, 635 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975); Ney v. California, 439 F.2d 1285, 1288 (9th Cir. 1971).

96. *See generally* Averitt, *supra* note 18, at 196; *see also* Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580 (7th Cir. 1977), *vacated and remanded*, 435 U.S. 992 (1978), *cert. denied*, 489 U.S. 1090 (1978); Turco v. Monroe County Bar Ass'n, 554 F.2d 515 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977); Williams v. Washington, 554 F.2d 369 (9th Cir. 1977); Mack v. Florida Bd. of Dentistry, 430 F.2d 862 (5th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971).

97. *See* New Jersey Educ. Ass'n v. Burke, 579 F.2d 764 (3d Cir.), *cert. denied*, 439 U.S. 894 (1978); Olitt v. Murphy, 453 F. Supp. 354 (S.D.N.Y. 1978).

98. Rooker v. Fidelity Trust Co., 263 U.S. at 416.

99. *See* Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977) (complaint alleged that state supreme court decision "took" plaintiff's property in violation of the due process clause of the fourteenth amendment).

100. See note 94 *supra*.

101. *Contra*, *Developments*, *supra* note 18, at 1334 n.14 (pleadings can be easily amended to avoid *Rooker* question).

102. *See, e.g.*, Ash v. Northern Ill. Gas Co., 362 F.2d 148, 151 (7th Cir. 1966) (plaintiffs in effect asking district court to exercise appellate jurisdiction); Zimring v. Hawaii, Civ. No. 79-0054 (D. Hawaii, filed June 25, 1979) (attempt to litigate issue under the "guise" of original action). *See also* Frazier v. East Baton Rouge Parish School Dist., 363 F.2d 861 (5th Cir. 1966) (plaintiff captioned federal action as an "application for judicial review").

103. See cases cited note 95 *supra*.

104. See cases cited note 65 *supra*.

105. See cases cited note 94 *supra*.

making it difficult to determine whether a claim actually is a disguised appeal.

In determining the attributes of an "appeal," the threshold step is to compare the nature of an "appeal" with the characteristics of an "original" action. Essentially, an appeal is any claim that could not be brought as an original action because it is barred by a previous judgment. The action is barred because it is founded upon the same claim set forth in the original action. Since it cannot be refiled as an original action, the proper procedure for seeking relief is to take an appeal.

This inquiry closely resembles the analysis underlying the doctrine of bar and merger (claim preclusion) in res judicata.[106] Claims barred by res judicata similarly cannot be brought again as original actions.[107] The congruence between res judicata and *Rooker* thus is apparent: any action barred by res judicata would also be barred by *Rooker*. Thus, a claim brought in federal court based upon a state court judgment disposing of the same claim would constitute an "appeal" of the state court judgment. Moreover, any action not barred by res judicata would not be barred by *Rooker* because it would not involve the same claim. With no appeal involved, the federal court would have original jurisdiction.

Accordingly, the preclusion of claims under *Rooker* is identical in scope to the claim preclusion under res judicata. There is nothing startling about this congruity because the scope of the definition of "claim" under state law determines whether a second action in federal court is the same claim and thus is barred by res judicata.[108] This same definition of "claim" also applies in determining whether a second action would be an appeal and thus prohibited by *Rooker*.[109] Hence, under *Rooker* and res judicata, the federal courts must look to what constitutes a "claim" in the state that rendered the allegedly preclusive state court judgment.

It may appear that two labels, *Rooker* and res judicata, are being used to describe the same idea. One might argue that *Rooker* simply stands for the principle that the federal court must apply res judicata if the state court would do so.[110] But *Rooker* and res judicata historically

106. See note 20 *supra*.

107. *See generally* RESTATEMENT (SECOND) OF JUDGMENTS, Explanatory Notes §§ 61-61.2, at 138-204 (Tent. Draft No. 5, 1978).

108. *See* Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183 (1941).

109. *See* 28 U.S.C. § 1738 (1976). See text accompanying note 118 *infra*.

110. In other words, *Rooker* can be viewed as changing the concept of res judicata. *Rooker* implies that res judicata can never be waived. A federal court must look to the law

have been treated differently as to the force of their application.

Rooker, because it is derived from statutory limitations on federal district court power,[111] is a jurisdictional doctrine.[112] Where applicable, *Rooker* holds that the federal court simply has no jurisdiction and must therefore dismiss the action[113] even if the issue is not raised by a party. On the other hand, res judicata, as an affirmative defense,[114] is waived unless raised in a timely fashion.[115] It is not a jurisdictional doctrine because a court must assume that it has jurisdiction before considering the defense of res judicata. Moreover, the application of res judicata is subject to exceptions,[116] clearly indicating that it is not jurisdictional.

In essence, however, there are not two doctrines, one a jurisdictional bar and the other a non-jurisdictional affirmative defense, but only one doctrine, a jurisdictional type of res judicata. Because the scope of *Rooker* preclusion is identical to the scope of claim preclusion under res judicata, as a practical matter there is no separate *Rooker* doctrine. Instead of treating *Rooker* and res judicata as two separate doctrines, one jurisdictional and the other a waivable affirmative defense, the two could be combined to constitute a single non-waivable jurisdictional doctrine of res judicata, bar and merger. Since *Rooker* has long been in usage as a distinct concept, however, *Rooker* and res judicata will be discussed herein as separate doctrines.[117]

Once the relationship between *Rooker* and res judicata is understood, the scope of *Rooker*'s jurisdictional preclusion may be determined by the res judicata law of the rendering state. The obligation to look to state law thus becomes clear. In res judicata terms, the "full

of the state which rendered the judgment and, if res judicata would be applied by the courts of that state, the federal court must dismiss the action.

111. 28 U.S.C. §§ 1331, 1354, 1257 (1976). See text accompanying notes 18-23 *supra*.

112. Rooker v. Fidelity Trust Co., 263 U.S. at 416.

113. *See* Currie, *supra* note 12, at 324.

114. FED. R. CIV. P. 8(c).

115. *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 607, n.19 (1976).

116. *See* Commissioner v. Sunnen, 333 U.S. 591 (1948) (problems of applying res judicata in tax cases); Mercoid Corp. v. Mid-Continent Invest. Co., 320 U.S. 661 (1944) (patent and antitrust case); Spilker v. Hankin, 188 F.2d 35 (D.C. Cir. 1951) (breach of attorney's fiduciary duty). *But see* Heiser v. Woodruff, 327 U.S. 726, 733 (1946) ("[W]e are aware of no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata"). *See generally* Torke, *supra* note 11, at 559-68.

117. The result would be the same whether *Rooker* and res judicata were discussed as one integrated doctrine or as two separate doctrines; only the terminology used in this Article would have to be changed. The focus of this Article, however, is to explain how the scope of *Rooker*'s jurisdictional preclusion is determined by the res judicata law of the rendering state and not how the effect of state res judicata law is governed by *Rooker*'s jurisdictional basis.

faith and credit" statute[118] requires the federal court to apply the law of the judgment-rendering state to determine preclusion. Under *Rooker*, the limitation that a federal court may not act as an appellate court requires the federal court to look to the law of the state in question to determine whether it would be acting impermissibly as an appellate court. The state's res judicata law would indicate whether or not it is exercising appellate functions.

Under both res judicata and *Rooker*, the federal court is compelled to act as if it were a court of the state in question, a result similar to that reached in diversity cases under the *Erie* doctrine.[119] Thus, as to the three cases noted earlier[120]—*Getty, Sylvander* and *Cornwell*—the federal courts were obligated to look to the claim preclusion law of the rendering state to determine whether to dismiss the action. Moreover, because *Rooker* is jurisdictional it commands dismissal, and any discussion of res judicata is superfluous. Over the past decade many courts have reached the correct *Rooker* result for the wrong res judicata reason.[121]

Thus, the potentially difficult questions of different parties, different claims and whether section 1983 actions constitute an exception to preclusion under *Rooker* must be answered by tracking state res judicata law. Where state law is not clear,[122] *Rooker* creates difficult problems of predicting how state courts would rule.[123] An absence of clarity, however, does not imply that federal courts are free to apply a general federal common law.[124]

118. *See* Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439-40 (1943); Currie, *supra* note 12 at 326-27. The federal court must apply the res judicata law of the state rendering the judgment. *See* Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183 (1941); Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 309 U.S. 4 (1939). *See generally* Comment, *Res Judicata in the Federal Courts: Application of Federal or State Law: Possible Differences Between the Two*, 51 CORNELL L.Q. 96 (1965).

119. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Professor Degnan argues that it is not *Erie* but rather § 1738 which commands this result in diversity cases. *See* Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 750-55 (1976).

120. See text accompanying notes 84-90 *supra*.

121. *E.g.*, Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103 (1st Cir. 1978); Winters v. Lavine, 574 F.2d 46 (2d Cir. 1978); Ellentuck v. Klein, 570 F.2d 414 (2d Cir. 1978); Cornwell v. Ferguson, 545 F.2d 1022 (5th Cir. 1977).

122. *See* McCune v. Frank, 521 F.2d 1152, 1157 (2d Cir. 1975) (vacating and remanding case so that parties can develop record on New York law).

123. *See Developments*, *supra* note 18, at 1258.

124. Thus, the argument for a "special res judicata" is not valid. *But see* Torke, *supra* note 11, at 568 (arguing for an exception to res judicata). Such cases as Graves v. Olgiati, 550 F.2d 1327, 1329 (2d Cir. 1977) (state res judicata law noted as not controlling); Newman v. Board of Educ., 508 F.2d 277, 278 (2d Cir.), *cert. denied*, 420 U.S. 1004 (1975) (federal law noted as controlling); and Lombard v. Board of Educ., 502 F.2d 631 (2d Cir. 1974), *cert.*

Application of the Rooker Doctrine

Three short hypotheticals best illustrate the application of the *Rooker* doctrine. Suppose State *X* has a rule against splitting causes of action; hence, a "claim" is defined by a "transaction" or "fact-groupings" test[125] as opposed to a "primary rights" test.[126]

A, a resident of State *X*, is an untenured professor at a public university in State *X* who has been denied tenure on the basis that he or she allegedly failed to meet the university's publications requirement for tenure. *A* files an action in the courts of State *X* alleging two claims: first, that the denial of tenure was "arbitrary and capricious"; and second, that the discharge was precipatated by *A*'s criticism of university policy in violation of his or her first amendment rights.[127] *A* loses on both grounds and the judgment is affirmed by the supreme court of *X*, which issues a written opinion.

If *A* were to file suit in federal district court asserting a cause of action under section 1983, the federal court should, if asked by the defendants, apply the doctrine of res judicata.[128] Because *A*'s federal court claims are the same as those litigated in state court, res judicata would require dismissal. In the event the defendants fail to raise the state court judgment as a bar to the federal action, the court should examine whether the federal action is the equivalent of an appeal of the state court judgment. As the same legal theories that were asserted in the state court action are being asserted in federal court, the action is clearly one seeking to reverse or annul the effects of the state court judgment. Obviously, every definition of a claim would treat *identical* suits as the same action. If the court assumed jurisdiction it would be acting as an appellate court of the state. Thus, the court has no jurisdiction and must dismiss under *Rooker*.

As a second example, suppose that in state court, *A* raises both an "arbitrary and capricious" claim and a first amendment claim. Suppose further that both the state trial and supreme court holdings refer only to the "arbitrary and capricious" claim, and that the state supreme court opinion cites only that ground in affirming the lower court's judg-

denied, 420 U.S. 976 (1975) (§ 1738 ignored, § 1983 considered an exception to res judicata), improperly ignore the controlling effect of § 1738.

125. *See generally* CASAD, RES JUDICATA IN A NUTSHELL 24-30 (1976); RESTATEMENT (SECOND) OF JUDGMENTS § 61(1) (Tent. Draft No. 1, 1973).

126. *See generally* CASAD, RES JUDICATA IN A NUTSHELL 21-23 (1976).

127. The facts of this hypothetical are based loosely on Jenson v. Olson, 353 F.2d 825 (8th Cir. 1965) (res judicata applied to bar subsequent federal action).

128. *See* Jenson v. Olson, 353 F.2d 825 (8th Cir. 1965).

ment of dismissal. *A* then files in federal court under section 1983, raising only the first amendment claim. Under either *Rooker* or res judicata, the result would be the same: *A*'s first amendment claim is barred. In applying the defense of res judicata, section 1738[129] *requires*[130] the federal court to give the judgment the same effect as would a court in State *X*. The judgment against *A* constituted an implicit determination of all claims.[131] *A*'s first amendment claim was *raised* but simply not *discussed* in the state court opinions. Thus, the judgment against *A* was an adverse determination on the first amendment issue. The state court judgment in the second hypothetical has the same force and effect as the judgment in the previous example. Res judicata, if raised, bars the separate filing of a first amendment action in federal court. Under a *Rooker* analysis the subsequent federal suit would be characterized as an attempt to annul or reverse an issue already decided by the state court judgment. Although only implicitly determined, the state courts obviously ruled against *A*'s first amendment claim in rendering their adverse judgment. Thus, the federal action is merely an attempt to seek review of that implicit determination of the first amendment claim, and under *Rooker* the federal court must dismiss for lack of jurisdiction.[132]

As a third illustration, assume *A* does not raise a first amendment claim in the state courts, but simply confines his or her case to the allegation that the denial of tenure was arbitrary and capricious. Further assume that the judgment rendered against *A* by the state trial court is affirmed by the state supreme court, whereupon *A* files suit in federal court raising the first amendment claim for the first time. If res judicata is properly raised as a defense, the federal court must dismiss the action. *A* should have brought both claims at once, and section 1738 requires the federal court to apply State *X*'s rule prohibiting the splitting

129. 28 U.S.C. § 1738 (1976).

130. *See* Currie, *supra* note 12, at 326 ("federal respect for state court judgments is . . . the command of Congress).

131. *See* Cromwell v. County of Sac, 94 U.S. 351, 353 (1876): "[T]hat a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate . . . ." *See also* Grubb v. Public Util. Comm'n, 281 U.S. 470, 477 (1929); Grossgold v. Supreme Court of Ill., 557 F.2d 122, 124-25 (7th Cir. 1977); Tang v. New York Supreme Court, 487 F.2d 138, 141 n.2 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974).

132. Because the state court has implicitly decided the issue, any consideration of that question by a federal court would place that court in the position of acting as an appellate court of the state. Under *Rooker*, the federal court has no jurisdiction to do so. *See* 263 U.S. at 415.

of causes of action.[133] *A* cannot now bring a separate first amendment claim in either state or federal court. Under a *Rooker* analysis, the same result once again is reached. When presented with the first amendment claim, the federal court must determine whether it represents an attempt to appeal any part of a final state decision. The first amendment claim in this case is just as much an attempt to "appeal" the state court judgment as in the previous examples. Because of State *X*'s rule against splitting causes of action, the state court judgment was a judgment on all claims that could have been raised from this set of facts. In other words, the first amendment claim was "decided" against *A*, although it was never explicitly raised in the original action. The filing of the federal action simply constituted an attempted appeal of part of that decision.

Although the results under *Rooker* may seem harsh, they are simply applications of the state's policy against splitting causes of action. The federal court is bound to follow that policy and has no power to pass on the wisdom of such a rule.[134] Under the three reasons set forth earlier: the Supreme Court's exclusive federal power of reviewing state court judgments,[135] the intent of Congress not to grant federal district courts appellate jurisdiction,[136] and the system-consistency of the district courts' power to review only original facts,[137] the federal courts in the previous hypotheticals may not review a state court judgment by entertaining the first amendment claim. Instead, they must dismiss for lack of jurisdiction.

These examples also imply that *Rooker* principles apply to courts of the same jurisdiction considering the effects of their respective judgments. Suppose *A*, in the third hypothetical, filed his or her first amendment claim in a second trial court of State *X*. Obviously, res judicata would apply to bar the action. Moreover, unlike the state-federal situations, the applicability of res judicata appears obvious, and that doctrine, not *Rooker*, usually would be the basis for dismissal.

If one were to examine the statutes and constitution of State *X*, one most likely would find jurisdictional principles and rules similar to sections 1257 and 1331 to 1343 of Title 28, implying that state trial courts have no appellate jurisdiction and that the state appellate courts

133. *See generally* Currie, *supra* note 12, at 326-27.
134. *Id.*
135. See text accompanying notes 51-60 *supra.*
136. See text accompanying notes 61-72 *supra.*
137. See text accompanying notes 73-79 *supra.*

shall have the sole authority to exercise appellate jurisdiction.[138] This would be one source of imputing the limitations of the *Rooker* doctrine to state trial courts attacking the judgments of sister trial courts of the same state. In addition to possible statutory limitations on appellate jurisdiction, the system-consistency rationale of *Rooker* also would apply to courts within the same state. System-consistency implies that a state trial court of original jurisdiction cannot act as an appellate court of a similar trial court. Otherwise, there would be two avenues of appeal for every trial decision with the attendant lack of finality and disruption of the appellate system. Thus, where res judicata bars a second action, the *Rooker* doctrine, as an inherent jurisdictional principle, also applies. *Rooker*, as well as res judicata, has vitality in such same-state situations. Hence, in both state-federal and same-state situations, *Rooker* and res judicata operate to compel identical claim preclusion effects. However, res judicata traditionally has been viewed as a waivable defense, while *Rooker* requires dismissal on jurisdictional grounds.

Neither res judicata nor *Rooker* would bar a subsequent suit in federal court that state law would recognize as a distinct and separate claim. In the previous example, for instance, if State *X* allowed splitting of legal theories and if *A* had not raised a constitutional claim in state court, such a claim could be raised in federal court. No jurisdictional principle would bar *A*'s access to federal court. Under the doctrines of collateral estoppel or issue preclusion, however, *A* may be estopped from litigating certain legal and factual questions that were determined against him or her in state court. The obligation to apply state collateral estoppel principles is also derived from the requirement that the federal court give prior state court judgments the same force and effect that they would have in the rendering state.[139]

The equitable doctrine of collateral estoppel is applied more flexibly than either *Rooker* or bar and merger. It applies only to issues that

138. *Cf.* CAL. CONST. art. 6, § 10 (West Supp. 1980) ("[s]uperior courts have original jurisdiction in all causes except those given by statute to other trial courts"); *id.* § 11 ("courts of appeal have appellate jurisdiction when superior courts have original jurisdiction and in other causes prescribed by statute. Superior courts have appellate jurisdiction in causes prescribed by statute that arise in municipal and justice courts in their counties"). *See* CAL. RULES CT. 29(a) (specifies grounds for hearing in the supreme court).

139. 28 U.S.C. § 1738 (1976). Because § 1738 commands the federal courts to give a state judgment the same full faith and credit to which it is entitled in the courts of the rendering state, the federal court must bar relitigation of issues that would be barred by the state's law of collateral estoppel. *But see* American Mannex Corp. v. Rozands, 462 F.2d 688, 690 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972) (competing federal policies outweighed policies of collateral estoppel).

were litigated, decided by the court, and necessary to the judgment, although various tests may establish these elements.[140] In addition, other policy-based restrictions may affect the application of collateral estoppel.[141]

Federal courts are not free to disregard the collateral estoppel effect of prior state court judgments: section 1738 commands that federal courts apply the law of the state which rendered the prior judgment however rigid or flexible.[142] Recent Second Circuit decisions adopting a general federal common law of res judicata and collateral estoppel are thus incorrect.[143] Those federal courts that argue for developing their own rules of collateral estoppel do so on the assumption that superior federal policies, embodied in statutes, are implicit exceptions to section 1738.[144] *Rooker* and section 1738, however, obligate the federal courts to follow state law as to both claim and issue preclusion. Their failure to do so has been the greatest recurring weakness of the federal system. The federal courts have neither looked to state law to decide claim and issue preclusion nor offered an explanation for their failure to do so.[145]

Because of the power of state courts to define a claim, *Rooker* and section 1738 potentially subordinate large areas of federal jurisdiction

140. F. JAMES & G. HAZARD, CIVIL PROCEDURE 563-71 (2d ed. 1977).

141. *See generally* Averitt, *supra* note 18, at 211 (res judicata limited in tax and tariff litigation); Torke, *supra* note 11, at 561-66 (discussing exceptions to res judicata involving tax, employment discrimination, and bankruptcy cases).

142. On the other hand, Professor Currie suggests arguments as to how federal courts may give greater preclusion effect to the judgments of state courts than allowed under state law. The same arguments could be made as to collateral estoppel. *See* Currie, *supra* note 12, at 326-27.

143. *See* Graves v. Olgiati, 550 F.2d 1327, 1329 (2d Cir. 1977) (claims not explicitly raised are not barred); Newman v. Board of Educ., 508 F.2d 277, 278 (2d Cir.), *cert. denied*, 420 U.S. 1004 (1975) (same); Lombard v. Board of Educ., 502 F.2d 631, 635-37 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975) (§ 1738 ignored; § 1983 considered an exception to res judicata). *See also* Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Hawaii 1978) (state res judicata law ignored); Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977) (state res judicata law not applied because of an alleged procedural due process violation). *But see* McCune v. Frank, 521 F.2d 1152, 1157 (2d Cir. 1975) (noting obligation to apply state law).

144. For a general discussion of the view supporting a § 1983 exception to res judicata, see Lauchli v. United States, 405 U.S. 965 (1972) (Douglas, J., dissenting); Averitt, *supra* note 18, at 211-16; Torke, *supra* note 11, at 552-66. *But see* Currie, *supra* note 12, at 327-50 (lack of exceptions to res judicata noted).

145. *See generally* Grubb v. Public Util. Comm'n, 281 U.S. 470 (1930); Phelps v. Harris, 101 U.S. 370 (1879); Graves v. Olgiati, 550 F.2d 1327, 1329 (2d Cir. 1977) (ignoring § 1738); Newman v. Board of Educ., 508 F.2d 277, 278 (2d Cir.), *cert. denied*, 420 U.S. 1004 (1975) (federal law controlling). *But see* McCune v. Frank, 521 F.2d 1152, 1157 (2d Cir. 1975) (remanding to state court to determine what state res judicata law requires).

to state law. Since state courts have the power to define what constitutes a claim, they have the potential for further limiting federal jurisdiction.[146] This state court "control" of federal jurisdiction may appear unacceptable because of the view that the federal courts are considered as the primary institutions to enforce constitutional and federal rights.[147] Nevertheless, state res judicata law precludes federal jurisdiction in these cases because a state court that properly assumed jurisdiction acted first. Where state courts have personal and subject matter jurisdiction, their final judgments are entitled to respect by all other courts, state and federal.[148] As long as the federal claimant had an adequate opportunity to be heard in state court, the state court judgment is final. A final state court judgment is a signal that the judicial system as a whole, both state and federal, has spoken with finality.[149] This finality is evidenced as much by the failure of the United States Supreme Court to review a state court judgment as by a grant of certiorari and a subsequent decision.

This principle of giving absolute finality to state court decisions has not always been supported by federal courts.[150] The primary fear of these courts has been that some state courts would not grant an adequate opportunity to litigate federal claims. A claim premised on a procedural due process violation, however, would not be barred by *Rooker* because it involves "process acts," a different set of "original" facts.[151] As a separate cause of action, a procedural due process viola-

146. The trend toward a more expansive definition of "claim" has meant that larger chunks of legal issues are precluded by state judgments under res judicata. *See* Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 327 (1971). One court has noted that the unthinking application of res judicata may make the civil rights acts a "dead letter." Ney v. California, 439 F.2d 1285, 1288 (9th Cir. 1971).

147. Mitchum v. Foster, 407 U.S. 225, 243 (1972) (§ 1983 is an expressly authorized exception to the anti-injunction statute).

148. U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (1976).

149. Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments*, 87 YALE L.J. 164, 188-89 (1977).

150. *See* Thistlethwaite v. City of New York, 497 F.2d 339 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974) (Oakes, J., dissenting); Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Hawaii 1978); Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977) (state supreme court allegedly violated procedural due process by failing to allow rehearing on the issue of the constitutionality of the decision itself). *See generally* Averitt, *supra* note 18, at 193-94; Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

151. If the judicial process treats a litigant in such a way that he or she is not given a fair opportunity to be heard, his or her fourteenth amendment right to procedural due process has been violated. He or she then should have the right to invalidate the judgment and repeat the judicial process with the defect corrected. However, the court invalidating the judgment should not have the right to substitute its own judgment on the substantive issue. This is the thrust of Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 681 (1930).

tion would not be precluded by res judicata or *Rooker*, although such claims may be dismissed under collateral estoppel[152] or equitable principles such as the *Younger* doctrine.[153]

Applicability of the Rooker Doctrine to Section 1983 Civil Rights Actions

In recent years the vast majority of cases raising the issues discussed herein have involved federal claimants asserting constitutional claims[154] under section 1983 in seeking to have final state court judgments set aside. *Rooker* has not figured prominently in the discussion.[155] Rather, the debate has focused on whether res judicata bars a subsequent section 1983 action in federal court. Most of the courts considering the question have applied res judicata,[156] although the obligation to look to state law under section 1738 has not often been explicitly noted.[157] The relevant question here is whether the arguments made for a section 1983 exception to res judicata also support a section 1983 exception to the *Rooker* preclusion principle.

On occasion courts have refused or hesitated to apply res judicata to bar a civil rights claim. In one case, the Ninth Circuit stated that to

For other cases making this distinction regarding procedural due process claims, see Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Hawaii 1978); Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977); Zimring v. Hawaii, Civ. No. 79-0054 (D. Hawaii, filed June 25, 1979).

152. For example, there are a number of cases where a convicted criminal defendant may recover for violations of civil rights on the ground that perjured testimony was used to convict. Because a § 1983 claim does not seek to set aside the conviction, it constitutes a separate cause of action and is not precluded by the doctrine of bar and merger. *See* Preiser v. Rodriguez, 411 U.S. 475 (1973). However, collateral estoppel often is applied. *See* Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975) (§ 1983 damages action alleging use of perjured testimony barred by collateral estoppel); Metros v. United States Dist. Court, 441 F.2d 313 (10th Cir. 1970) (§ 1983 action brought seeking damages for violation of the fourth amendment barred by collateral estoppel). *But see* Ney v. California, 438 F.2d 1285 (9th Cir. 1971) (conviction alone cannot bar subsequent § 1983 action); Kauffman v. Moss, 420 F.2d 1270 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970) (collateral estoppel not applied because issue of perjury not actually litigated in conviction proceeding).

153. *See* Trainor v. Hernandez, 431 U.S. 434 (1977) (*Younger* doctrine applied to suit seeking to enjoin, on due process grounds, use of Illinois Attachment Act); Juidice v. Vail, 430 U.S. 327 (1977) (*Younger* doctrine requires district court to dismiss suit seeking to enjoin application of civil contempt statute on due process grounds).

154. Similarly, the focus of academic attention has been on subsequent actions raising constitutional claims. *See generally* Averitt, *supra* note 18; McCormack, *supra* note 18, at 250; Theis, *supra* note 18; Torke, *supra* note 11.

155. See cases cited notes 44-46 *supra*.

156. See cases cited note 13 *supra*.

157. See cases cited note 154 *supra*.

do so would render the civil rights acts a "dead letter."[158] The courts that have not applied res judicata have generally been those faced with cases where the federal claimant was an unwilling state court defendant[159] or where there were procedural due process flaws in the state judicial process.[160] Other courts have justified exceptions or expressed a need for caution where there was a strong federal interest at stake.[161] Moreover, the language in *England v. Louisiana State Board of Medical Examiners*,[162] stressing the importance of federal factfinding on federal issues, has been used as the basis for asserting a section 1983 exception to res judicata.[163]

Commentators also have argued strongly for a section 1983 exception to res judicata. Although none have maintained that section 1983 claims always should be an exception, various standards have been suggested for determining wherein res judicata should not be applicable. One commentator has argued that res judicata should not bar the subsequent section 1983 action when the state court litigation involved an individual and a state as adverse parties to the controversy, where the state had an institutional interest in the litigation, and where there was a procedural defect such as inadequate factfinding.[164] Another position,[165] later adopted by the Second Circuit,[166] asserted that res judicata should apply only when the federal claimant's constitutional claims were freely presented in state court for conclusive resolution. Other tests have focused on the predicament of unwilling state court defendants forced to litigate their claims in a forum not of their choosing. One proposed exception permits actions in which state remedies were exhausted and the federal claimant was an unwilling defendant in

158. Ney v. California, 439 F.2d 1285, 1288 (9th Cir. 1971).

159. See cases cited note 96 *supra*.

160. *See* Lombard v. Board of Educ., 502 F.2d 631 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975) (res judicata not applicable to cases raising procedural due process claims); Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Hawaii 1978) (same); Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977) (same).

161. *See* Red Fox v. Red Fox, 564 F.2d 361, 365 nn.3-4 (9th Cir. 1977).

162. 375 U.S. 411, 416-17 (1976): "Limiting the litigant to review here [following judgment by a state court] would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. . . . The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts."

163. *Id.*

164. McCormack, *supra* note 18, at 276-77.

165. Theis, *supra* note 20, at 882.

166. Graves v. Olgiati, 550 F.2d 1327 (2d Cir. 1977) (issues not raised are not barred by res judicata); Newman v. Board of Educ., 508 F.2d 277 (2d Cir.), *cert. denied*, 420 U.S. 1004 (1975) (same).

the state proceedings.[167]

All of these proposals are founded on the assumption that the state courts will not always be fair forums for the resolution of federal constitutional claims. The various tests focus on procedural defects in the state court processes and the lack of interest or skill on the part of state courts in enforcing rights guaranteed by the federal constitution. Nonetheless, the litigant who chooses a state forum first invites no sympathy. The courts and the commentators have sought only to protect unwilling state defendants who must raise their constitutional claims before an unfriendly state court or run the risk of claim preclusion.

For example, in *Thistlethwaite v. City of New York*,[168] the defendant was arrested under a constitutionally suspect park ordinance for distributing political leaflets without a permit. He was convicted and fined by a state criminal court. In such a situation, federal courts and commentators have argued the state court almost automatically will decide against the defendant on his or her constitutional claims. Moreover, because the defendant was brought unwillingly into state court and forced to litigate there, it is urged such a judgment should not be given collateral estoppel or res judicata effect. Advocates of this position emphasize that constitutional claims are easily overlooked in such situations because of the trial court's focus on the guilt or innocence of the defendant. Furthermore, it is argued, to hold constitutional issues that were raised but not addressed in a criminal proceeding as having been implicitly decided, and thus forever barred, is to ignore the realities of state criminal prosecutions.[169]

Allegations of procedural due process violations are not limited to criminal proceedings. In *Robinson v. Ariyoshi*[170] and *Sotomura v. County of Hawaii*,[171] the losing state court litigants convinced the fed-

167. See note 96 *supra*. Another proposed exception is addressed only to collateral estoppel and provides that collateral estoppel should not apply to involuntary defendants in state proceedings who were forced to exhaust their state judicial remedies. *Developments*, *supra* note 18, at 1338-43.

168. 497 F.2d 339 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974).

169. A distinction must be made between constitutional issues implicitly decided by the conviction as part of the same cause of action and issues which constitute a different cause of action. Judge Oakes, in his dissent, argued that the constitutionality of the prospective application of the statute in *Thistlethwaite* was a different cause of action from the question of the statute's facial constitutionality. He therefore urged that the defendants' suit was not precluded by collateral estoppel or res judicata. 497 F.2d at 343-44 (Oakes, J., dissenting). See also cases cited note 152 *supra*.

170. 441 F. Supp. 559 (D. Hawaii 1977). For a further discussion of the jurisprudential issues raised in *Robinson*, see Chang, *Unraveling Robinson v. Ariyoshi: Can Courts Take Property?*, 2 U. HAW. L. REV. 57 (1979).

171. 460 F. Supp. 473 (D. Hawaii 1978).

eral district court that denial of a rehearing on constitutional issues raised by the state supreme court's decision was itself a violation of their constitutional rights.[172] Even state administrative proceedings, despite subsequent state judicial review affirming the result, are subject to procedural due process attack. The Fifth Circuit in *Mack v. Florida State Board of Dentistry*[173] found the administrative proceeding revoking plaintiff's license to practice dentistry so procedurally unfair that it refused to give res judicata effect to a state court judgment affirming the agency's decision.

In addition to suspicions that state court processes may be constitutionally inadequate, some courts and commentators assert state courts are not competent to consider federal constitutional claims.[174] State court judges, it is argued, lacking permanent tenure and closely tied to state government, will not give the proper weight to constitutional claims raised by litigants in proceedings against the state governments.[175] Other commentators assert that state court judges are more distant from the Supreme Court than federal judges and therefore are less likely to be aware of recent constitutional developments.[176] Significantly, these arguments have not been made in regard to state appellate courts, which admittedly have a record equal to that of the federal courts in protecting constitutional rights.[177] Despite the criticisms of state trial court judges and the noted preference of litigants for federal court, state courts nevertheless have jurisdictional power equivalent to that of federal courts to decide federal constitutional claims.[178]

172. In *Robinson* the parties, on rehearing in the state supreme court, were allowed to address the validity of the decision as it rested on the application of a Hawaii statute. They were not heard on the constitutionality of the decision itself. McBryde Sugar Co. v. Robinson, 54 Hawaii 174, 504 P.2d 1330 (1973), *aff'd on rehearing*, 55 Hawaii 260, 517 P.2d 26 (1973). That issue was implicitly decided by the court's decision, because courts presumptively issue only decisions which they believe are constitutional.

173. 430 F.2d 862 (5th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971).

174. For a scathing attack on a state supreme court for ignoring procedural due process, see Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977). *See also* Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352 (1970).

175. *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 427 (1964) (Douglas, J., concurring).

176. *Cf.* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1124-25 (1977) ("[f]ederal judges appear to recognize an affirmative obligation to carry out and even anticipate the direction of the Supreme Court. Many state judges, on the other hand, appear to acknowledge only an obligation not to disobey clearly established law").

177. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). *See* Howard, *State Courts and Constitutional Rights In The Day Of The Burger Court*, 62 VA. L. REV. 873 (1976).

178. *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 611 (1975): "[A]ppellee is in truth urg-

Mitchum v. Foster

The first defense against the application of *Rooker* or res judicata to subsequent section 1983 claims typically is reference to the Supreme Court's decision in *Mitchum v. Foster*.[179] In *Mitchum*, the Court held that section 1983 was an express exception to the Anti-Injunction Act.[180] The very purpose of section 1983, the Court stated, is to "interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.' "[181]

The narrow meaning of *Mitchum*, however, is that section 1983 is an "expressly authorized exception" to section 2283, not to section 1738.[182] Moreover, while a strained application of *Mitchum* might read section 1983 as carving out an implied exception to section 1738, to avoid the *Rooker* doctrine section 1983 would have to read as an implicit modification of more basic statutory provisions: sections 1331, 1343 and 1257 of Title 28.

Furthermore, section 1983 creates a cause of action and *not* jurisdiction, particularly appellate jurisdiction, in the federal courts.[183] There is no legislative history suggesting Congress intended section 1983 to be a vehicle for transferring state appellate jurisdiction to the federal district courts.[184] The short life of the statute seeking to accomplish such a result through removal[185] only indicates that Congress

ing us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do."

179. 407 U.S. 225 (1972). *See* Averitt, *supra* note 18, at 210 (arguing that *Mitchum* implies an exception to res judicata for § 1983); Currie, *supra* note 12, at 329 (noting and disposing of *Mitchum* argument); Torke, *supra* note 11, at 558 (*Mitchum* supports an exception).

180. 407 U.S. 225.

181. *Id.* at 242 (citing *Ex parte* Virginia, 100 U.S. 339, 346 (1879)).

182. *See* Currie, *supra* note 12, at 329-30. Furthermore, in *Mitchum* the Supreme Court applied *Younger* as a grounds for dismissal. 407 U.S. at 243.

183. Hagans v. Lavine, 415 U.S. 528, 535 (1974) ("§ 1983 merely creates a cause of action and "does not by itself confer jurisdiction upon the federal courts to adjudicate these claims"). *See also* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950) (Declaratory Judgment Act creates remedy but does not extend federal jurisdiction).

184. Indeed, it would seem such a major modification of § 1257 would have drawn much more comment.

185. *See* Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 CALIF. L. REV. 943 (1976). "In 1863 Congress provided for removal in certain cases to a circuit court before *or after* judgment in a state court with explicit provision for retrial of the facts and law in circuit court." *Id.* at 947 n.22. The statute was held unconstitutional.

would have been explicit had section 1983 been intended to effect any such dramatic change. In any event, because the question of federal review of state court action in any forum was so controversial,[186] an attempt by the Supreme Court to enlarge the powers of review granted to the lower courts surely would have received closer scrutiny in Congress. Hence, *Mitchum* undoubtedly fails to state a civil rights exception to *Rooker*.

England v. Louisiana State Board of Medical Examiners

Along with *Mitchum*, the Supreme Court's decision in *England v. Louisiana State Board of Medical Examiners*[187] often is cited as the basis for a section 1983 exception to res judicata[188] and is thus another potential argument for the inapplicability of *Rooker* to section 1983 cases. In *England* the Supreme Court held that a federal court which properly has jurisdiction may abstain and send the litigants to state court to resolve issues of state law. If the litigants properly reserve their federal issues, they may return to federal court without risking the jeopardy of claim preclusion under res judicata.[189] In reaching this result, the Court emphasized the importance of federal factfinding on federal questions.[190] *England* has since been cited in the section 1983 res judicata cases[191] as somehow supporting the principle that if federal claimants begin in state court (as either plaintiffs or defendants), they may by so doing reserve their federal claims for subsequent resolution in federal court. Res judicata would not apply in such case to state determinations of federal issues.

Clearly, this analysis misconstrues *England*.[192] *England* applies only when litigants properly invoke federal jurisdiction *first* and are sent to state court by a federal court retaining jurisdiction. In that situation, the litigants may return to federal court and the state court judgment will not be barred by res judicata. Moreover, the *England*

186. See note 54 *supra*.

187. 375 U.S. 411 (1964).

188. *See* Currie, *supra* note 12, at 331-32 (*England* argument disposed of); *cf.* Averitt, *supra* note 20, at 212 (citing *England* as support for guaranteeing access to a federal forum).

189. *See* 375 U.S. at 417.

190. *Id.* at 416.

191. See cases cited note 13 *supra*.

192. *See* Wilke & Holzheizer, Inc. v. Reimel, 266 F. Supp. 168 (N.D. Cal. 1967) (three judge court rejecting plaintiff's argument that even though the litigants started out in state court, federal claims could be reserved for resolution in federal court). *But see* McCormack, *supra* note 18, at 331 ("[t]he plaintiff in *Wilke* had done everything required by *England* aside from actually making an appearance in federal court to reserve his federal claims").

doctrine itself is confusing,[193] encourages delays,[194] and is inconsistent with federal jurisdiction and section 1738.[195] Nowhere has this confusion been more evident than in the cases involving both res judicata and section 1983, where litigants initially in federal court have been sent to state court under abstention doctrines,[196] yet have been barred by res judicata on their return to federal court.[197]

As Professor Currie observes, *England* violates the principle that a federal court should go on to decide the case when federal jurisdiction is properly invoked.[198] Further, *England* completely contradicts the *Rooker* mandate that final state court judgments, notwithstanding federal abstention, bar subsequent federal review.[199] Indeed, *England* alienates federal-state relations by depriving state courts of their power to decide constitutional questions and by compelling them, in many cases, to issue what are essentially advisory opinions.[200]

England's disregard of the statutory command of section 1738 is problematic itself but, in light of *Rooker*, serious questions remain over the jurisdictional power of a federal court to take a case back from state court and refuse to give effect to the state court judgment. If the state court had jurisdiction after abstention, the federal court is clearly acting as an appellate court of the state. The Supreme Court in *England*, thus appears to have divested itself of its statutorily conferred exclusive jurisdiction to review state court judgments without a valid basis for that action.

Another interpretation of *England* is that state court jurisdiction

193. McCormack, *supra* note 18, at 270.

194. Abstention, in general, entails delays of several years. *See, e.g.*, England v. Louisiana State Bd. of Medical Examiners, 384 U.S. 885 (1966) (six years); United States v. Leiter Minerals, Inc., 381 U.S. 413 (1965) (mooted out eight years after abstention ordered); Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951) (seven years).

195. Currie, *supra* note 12, at 331 ("[t]o reduce the violence abstention does to section 1331, *England* ignores 1738").

196. See note 202 *infra*.

197. Cornwell v. Ferguson, 545 F.2d 1022 (5th Cir. 1977); Kay v. Florida Bar, 323 F. Supp. 1149 (S.D. Fla. 1971) (incorrectly applying *England*).

198. Currie, *supra* note 12, at 331.

199. If the state court properly has jurisdiction after abstention, then its decision must be conclusive as to all issues even though not raised—including the reserved federal issues. Grubb v. Public Util. Comm'n, 281 U.S. 470 (1930); Cromwell v. County of Sac, 94 U.S. 351, 353 (1876). Thus, under *Rooker*, the state judgment deprives the federal court of jurisdiction to determine the reserved federal issues.

200. In United Serv. Life Ins. Co. v. Delaney, 328 F.2d 483 (5th Cir. 1964), the Fifth Circuit abstained so that the state court could clarify a question of state law. The Texas Supreme Court refused to do so because the decision would be only an "advisory opinion." 396 S.W.2d 855 (Tex. 1965).

over the entire controversy is simply an illusion, that the state court has the power to decide the case as to state issues but may only "comment" on federal questions. Because the federal court in *England* was obligated in any event to apply state law, it may be concluded that the federal court has granted nothing substantive to the state court. One might say that the state court acts as a "special master" as to state law questions.[201] If so, *England* allows federal courts to impose a role upon state courts that is constitutionally suspect and not intended by Congress.[202] If the principles of *Rooker* are correct, then *England* is wrong, for it represents an attempt by the Supreme Court to divest itself of its exclusive jurisdiction over state court judgments. Only Congress has the authority to make such a decision.

Unwilling State Defendants

The argument for a guaranteed right to "one federal forum"[203] in section 1983 cases is based on a perception that state courts are less capable than federal courts of resolving federal claims. Professor Currie counters this argument by noting that Congress could have provided for removal to federal courts where the answer alleges a defense involving a federal question.[204] Further, the Supreme Court recently has emphasized that the federal courts are not to doubt the ability of state tribunals to resolve federal claims.[205] The concurrent jurisdiction of state and federal courts over constitutional claims and the policies embodied in *Rooker* and section 1738 create little doubt that Congress did not intend to provide a rule guaranteeing access to a federal district court. Both *Rooker* and section 1738 command federal courts to apply claim or issue preclusion regardless of whether the party was a state court plaintiff or defendant.

201. In essence, state supreme courts would be performing a non-binding certification service. *See Developments*, *supra* note 18, at 1253 n.21 (authorities on state law certification).

202. *Id.* Congress has not passed a compulsory certification statute. The problems arising from the *England* decision actually are the result of the Court's attempt to ameliorate the harshness of the abstention doctrine announced in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). *Pullman* announced the doctrine that federal courts should decline to exercise jurisdiction in favor of a state court determination in cases involving unsettled issues of state law which could moot or alter the federal constitutional claims. *See generally Developments*, 1250-51, 1253 n.20.

203. *See* Comment, *The Collateral Estoppel Effect of State Criminal Convictions in Section 1983 Actions*, 1975 U. ILL. L.F. 95, 101-06 (1975) ("alternate federal forum" proposal).

204. Currie, *supra* note 12, at 333: "The normal means of effectuating a congressional judgment that state courts afford inadequate protection of federal defenses would have been to authorize removal by state court defendants raising those defenses."

205. *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 611 (1975).

Given that state courts have equal power to decide questions of constitutional law, final state court judgments on section 1983 claims must be treated with the same force and effect as state court judgments on state law. Federal courts have no power to review such judgments, for if they did, they would be acting impermissibly as state appellate courts. The proper application of *Rooker* has not been lost only on the lower federal courts. The Supreme Court also has failed to apply it in the *Younger* line of cases where it was clearly appropriate.

The Younger Doctrine

In *Younger v. Harris*,[206] the Court held that for reasons of equity, comity and federalism, federal courts may not interfere in pending state criminal proceedings except under narrowly defined circumstances.[207] In succeeding cases, *Younger* was extended to include civil as well as criminal proceedings,[208]and completed,[209] as opposed to merely pending, state proceedings.[210] Professor Currie observes that, as to completed state proceedings, the doctrine of res judicata is a more legitimate ground of decision than *Younger*.[211] The import of that analysis also applied to *Rooker*. Where res judicata would bar the claim, *Rooker* also would deprive the federal court of jurisdiction.[212] Thus, *Rooker*, and not res judicata or *Younger*, is the obligatory grounds for the dismissal in these cases.[213] The federal courts should not reach the res judicata or *Younger* issues. *Huffman v. Pursue, Ltd.*[214] illustrates this point well. Civil nuisance proceedings instituted pursuant to an Ohio statute were brought against Pursue's predecessor in interest for operating a pornographic movie theater. The state court declared the movies obscene and ordered the theater closed for one year. The judgment also provided for seizure and sale of all personal

206. 401 U.S. 37 (1971).

207. *Id.* at 44-45.

208. Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

209. Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

210. Mitchum v. Foster, 407 U.S. 225 (1972); Younger v. Harris, 401 U.S. 37 (1971).

211. Currie, *supra* note 12, at 319-21.

212. See text accompanying notes 106-225 *supra*.

213. Professor Currie notes the applicability of *Rooker*, but does not concede that its scope is coextensive with res judicata. Particularly, he asserts that the *Rooker* doctrine is not broad enough to cover such cases as Wooley v. Maynard, 430 U.S. 705 (1977), where the federal plaintiff seeks to relitigate issues that should have been raised in the state court proceeding. He argues that only res judicata can "fill the gap." *See* Currie, *supra* note 12, at 324-25.

214. 420 U.S. 592 (1975).

property used in conducting the nuisance.[215] Instead of appealing the judgment within the state system, Pursue filed a section 1983 action in federal court seeking injunctive and declaratory relief. A three judge court[216] was convened to review the constitutionality of the statute. The court found the statute to be unconstitutionally overbroad and enjoined the enforcement of the state court judgment as to movies not declared obscene. The three judge court did not discuss the applicability of *Younger*.

The Supreme Court, in an opinion by Justice Rehnquist, reversed, citing the applicability of the federalism principles expressed in *Younger*. The Court found it was unimportant that the action was labeled a civil proceeding, noting that it actually was quasi-criminal in nature and that the state was seeking to vindicate an important state interest.[217] Nor was it critical to the Court that the state proceedings were completed rather than pending. The principles of *Younger* still applied because federal jurisdiction after a final state court judgment would be even more duplicative than intervention in pending proceedings.[218] Moreover, Justice Rehnquist stated that *Younger* required exhaustion of state court appellate remedies before attempting to invoke federal district court jurisdiction: "For regardless of when the Court of Common Pleas' judgment became final, we believe that a necessary concomitant of *Younger* is that a party in appellee's posture must exhaust his state appellate remedies before seeking relief in the District Court . . . ."[219]

This requirement of exhaustion of state judicial remedies provoked a spirited retort from the three dissenting Justices in *Huffman*.[220] They viewed it as the first step toward reversing the settled doctrine that section 1983 actions may be maintained without exhaustion of state judicial remedies.[221] The dissent reminded the majority that, under *Monroe v. Pape*,[222] in section 1983 cases the federal remedy is supplementary to the state remedy[223] and that state remedies need not be exhausted before a federal claim is invoked. Moreover, they argued,

215. *Id.* at 595-99.
216. 28 U.S.C. § 2284 (1976) authorizes a three judge district court in certain cases.
217. 420 U.S. at 604.
218. *Id.* at 608.
219. *Id.*
220. *Id.* at 617 (Brennan, J., dissenting).
221. *See* Damico v. California, 389 U.S. 416 (1967); McNeese v. Board of Educ., 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961).
222. 365 U.S. 167 (1961).
223. 420 U.S. at 617 (Brennan, J., dissenting).

under the ruling in *Huffman*, "the mere filing of a complaint against a potential section 1983 litigant forces him to exhaust state remedies."[224]

However contradictory it may seem, there is merit in both the dissent's arguments and the result in *Huffman*. The dissent is correct in observing that there is no requirement of exhaustion of state judicial remedies prior to filing a section 1983 action in the federal courts.[225] Nevertheless, *Huffman* reached the correct result, but *Rooker*, not *Younger*, should have been its rationale. Res judicata would have produced the same result, but the defendants apparently failed to raise it, and it was deemed waived.[226] *Younger* is a contorted means of reaching the proper result in *Huffman*. To use the *Younger* doctrine in *Huffman*, the Court had to apply the doctrine to completed, as opposed to pending, and civil, as opposed to criminal, proceedings. Moreover, because appeals were not taken in state courts in *Huffman*, Justice Rehnquist's reasoning required the creation of a judicial exhaustion requirement in section 1983 actions.

There is no need to use the *Younger* doctrine to bar federal actions subsequent to completed state proceedings, civil or criminal. When *Younger* is stretched to cover the *Huffman* situation, an exhaustion of remedies requirement must be created. But when properly analyzed under *Rooker*, there is no question of exhausting state judicial remedies prior to relitigating in federal court because there is simply no allowance for relitigation of the same cause of action in federal court. The failure to appeal within the state court system is not a waiver of access to a federal forum, as any "exhaustion" discussion implies, but rather is simply the decision to live with a lower court judgment. As such, a final state court judgment will create a claim preclusion effect as to any later action. Thus, "[f]ederal posttrial interventions, in a fashion designed to annul the results of a state trial,"[227] should not be solved under *Younger* but under *Rooker*. Where the federal action is to annul the state court judgment, it is necessarily precluded because it is an appeal of a state court judgment. In essence, *Rooker* expresses the same federalism principles that Justice Rehnquist enunciated in *Huffman*: that intervention after trial is duplicative of the trial that has already taken place, implying a direct aspersion on the capabilities and good faith of state courts in resolving constitutional issues, and that posttrial federal nullification is offensive to a state which has already

224. *Id.*
225. *Developments*, *supra* note 18, at 1264.
226. 420 U.S. at 607 n.19.
227. *Id.* at 609.

won a determination that its policies have been violated.[228] These principles already are expressed implicitly in the exclusivity principle of section 1257 and the limitation of original jurisdiction in sections 1331 and 1343.

Although *Younger* and *Rooker* state similar principles, the applicability of *Rooker* in *Younger* situations has not always been obvious. Professor Currie argues that *Rooker* would not cover situations such as in *Sosna v. Iowa*[229] and *Wooley v. Maynard*,[230] where "the federal plaintiff seeks not to avoid the direct consequences of a state judgment but to relitigate issues that were or should have been raised in the state proceedings."[231] As the scope of res judicata and *Rooker* are identical, however, *Sosna* and *Wooley* must be decided on *Rooker* grounds.

Sosna v. Iowa[232] upheld an Iowa statute that imposed a one year residency requirement on divorce plaintiffs. Ms. Sosna, who had resided in Iowa for less than one year, filed for divorce. Her husband made a special appearance to quash the petition and the Iowa court dismissed. Instead of appealing through the Iowa state courts, Ms. Sosna filed an action in federal district court seeking declaratory and injunctive relief on the ground that the statute infringed upon her fundamental right to travel. The United States Supreme Court urged the parties to consider *Younger*.[233] The parties did not do so and the Court eventually decided the case on the merits of the constitutional issue. Ms. Sosna undoubtedly could have raised her constitutional claims in state trial and appellate courts. Thus, if Iowa law would not have allowed her to split her constitutional argument into a separate claim, *Rooker* would have barred the federal district court from taking jurisdiction.

In *Wooley v. Maynard*,[234] Maynard was convicted for covering the state motto, "Live Free or Die," which appeared on his automobile license plate. As interpreted by the New Hampshire Supreme Court, this act was a misdemeanor under a state statute. Maynard did not appeal his convictions, but instead brought a section 1983 action in federal court seeking a declaration that the statute was unconstitutional

228. *Id.* at 608-09.
229. 419 U.S. 393 (1975).
230. 430 U.S. 705 (1977).
231. Currie, *supra* note 12, at 324-15.
232. 419 U.S. 393 (1975).
233. *Id.* at 396 n.3.
234. 430 U.S. 705 (1977).

and injunctive relief against any future arrests and prosecutions. A three judge district court entered an order granting the injunctive relief.

The Supreme Court held *Younger* inapplicable.[235] Moreover, the Court distinguished *Huffman*, which was similar in that the federal claimant had failed to exhaust state appellate remedies, on the ground that the relief sought in *Maynard* was wholly prospective and was "in no way 'designed to annul the results of a state trial.' "[236] Was *Rooker* applicable? The key question is whether a claim for prospective relief would be considered the same claim as that upon which the misdemeanor conviction was based. *Rooker* compels the federal court to look to New Hampshire law, which suggests that the cause of action would be different.[237] While the result appears correct, the Court's failure to discuss state law which defines the scope of a claim under either *Rooker* or section 1738 is troubling. The "prospective only" basis of the decision must be viewed as a distinction applicable only to the *Younger* doctrine. However, *Rooker* was the correct basis for the decision.

The lower federal courts have taken their cues from the Supreme Court and applied *Younger* instead of *Rooker*. In one case,[238] the Fifth Circuit even implied that *Younger* and *Rooker* embody the same principle.[239] Both are federalism principles, but as to completed state proceedings, *Rooker* must be considered before resorting to *Younger*.

Conclusion

The importance of recognizing the application of *Rooker* cannot be overemphasized. The effect of allowing the lower federal courts to act as the appellate courts of the state not only contravenes the statutory grants of jurisdiction to the federal courts but undermines state judicial sovereignty. No longer are state court judgments final and

235. *Id.* at 711.

236. *Id.*

237. *See* Bottomley v. Parmenter, 85 N.H. 322, 326, 159 A. 302, 304 (1932) (implying that the causes of action for quantum meruit and contract are different); Currie, *supra* note 12, at 350 n.216.

238. Duke v. Texas, 477 F.2d 233 (5th Cir. 1973), *cert. denied*, 415 U.S. 978 (1974).

239. 477 F.2d at 252-53 (*Rooker* is argued as supporting the decision under *Younger*). *See also* New Jersey Educ. Ass'n v. Burke, 579 F.2d 764 (3d Cir.), *cert. denied*, 439 U.S. 894 (1978) (*Younger* held not applicable; *Rooker* should have been used to sustain lower court dismissal); Piatt v. Louisville & Jefferson County Bd. of Educ., 556 F.2d 809 (6th Cir. 1977) (decided on *Huffman* grounds; *Rooker* a better basis for decision); Williams v. Washington, 554 F.2d 369 (9th Cir. 1977) (*Rooker* mentioned, but case improperly decided on *Younger* grounds).

state courts the final arbiters of state law.[240] The prospect that state court judgments may be attacked under section 1983 substantially impedes the ability of state court litigants to achieve one major goal of litigation: final resolution of a dispute. For winners and losers alike, the most important aspect of the system is missing. The Utah Supreme Court's statement in *Pope v. Turner*[241] is illustrative: "In other words, we are given the satisfaction of knowing that that which we do in this matter is of no consequence whatsoever and that the ruling of the Supreme Court of a sovereign state of the Union is subject to the whim of the inferior courts in the Federal system." Responsibility falls on the Supreme Court to safeguard state jurisdictional sovereignty against impermissible encroachments by the lower federal courts. The Court not only is "supreme" over all other courts but, more importantly, it alone has been granted exclusive jurisdiction to review state judgments. By failing to reverse lower courts on the basis of the *Rooker* doctrine, the Supreme Court is implicitly divesting itself of its jurisdiction. Just as the lower federal courts may not on their own enlarge their jurisdiction,[242] the Supreme Court may not, without congressional permission, share its exclusive jurisdiction with the lower courts. Such a delicate issue of fundamental federal-state relations must be left to a representative forum, such as Congress, where the justifications for state judicial sovereignty can be fully represented.[243]

Justice Frankfurter's dissent in *Konigsberg v. State Bar*,[244] wherein he reminded the Court of the historical background of its own jurisdiction, is here appropriate. He cited Justice Benjamin R. Curtis, who

240. For dramatic instances of where federal district courts have usurped the ability of state supreme courts to decide questions of state law with finality, see Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Hawaii 1978) (federal district court voiding state supreme court decision on question of ownership of beaches); Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977) (voiding state supreme court decision on question of water rights). *But see* Smiley v. South Dakota, 551 F.2d 774 (8th Cir. 1977) (federal courts have no jurisdiction to review state supreme court decisions in appellate capacity; *Rooker* applied); Zimring v. Hawaii, Civ. No. 79-0054 (D. Hawaii, filed June 25, 1979) (same).

241. 30 Utah 2d 286, 289, 517 P.2d 536, 537 (1973). Although *Pope* is a habeas corpus case, the court's sentiments may be shared by state supreme courts whose judgments have been nullified in the civil area.

242. See note 82 & accompanying text *supra*.

243. *See generally* National League of Cities v. Usery, 426 U.S. 833, 876-78 (1976) (Brennan, J., dissenting) ("[i]t is unacceptable that the judicial process should be thought superior to the political process in this area"); Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977) (Congress, as a respresentative body, is better adapted to decide constitutional questions regarding the power of the national government vis-á-vis the states).

244. 353 U.S. 252, 274 (1957) (Frankfurter, J., dissenting).

stated more than a hundred years earlier: "Let it be remembered, also,—for just now we may be in some danger of forgetting it,—that questions of jurisdiction were questions of power as between the United States and the several states."[245] Frankfurter went on to cite Justice Stone's opinion for a unanimous court in *Healy v. Ratta*:[246] "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute [implementing the judiciary sections of the Constitution] has defined."[247]

Now, more than ever, the Court is acutely aware of the need to balance state and federal judicial interests. For that reason, the implicit jurisdictional principle of federalism expressed in *Rooker* and long overlooked must be rediscovered.

245. *Id.* (quoting B. CURTIS, A MEMOIR OF BENJAMIN ROBBINS CURTIS 340-41 (1879)).
246. 292 U.S. 263 (1934).
247. 353 U.S. at 274 (Frankfurter, J., dissenting) (quoting Healy v. Ratta, 292 U.S. 263, 270 (1934)).